

THE law-language of these times was *Latin* or *French*, but more commonly the former. The only laws of this time now subsisting in Norman-French, are those which compose the first collection of William the Conqueror. All the other laws from that time to the time of Edward I. are in Latin. There are some few charters of the first three Norman kings which are either in Anglo-Saxon or in Latin, with an English version; of which sort there are several now remaining in the Cottonian and other collections^f.

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the CONQ.
to
JOHN

WITHOUT doubt the Norman laws of William were proclaimed in the county court in Anglo-Saxon, for the information of the English, who still continued to conduct business there in their own language, as they did in all inferior courts: but in the *curia regis* and *ad fcaecarium* William obliged them to plead in the Norman tongue, as most consistent with the law there dispensed, and that which was best understood by the justices. However, notwithstanding this language was used in pleading and argument, all proceedings there, when thrown into a record, were enrolled in a more durable language, the Latin. This was the language in which all writs, laws, and charters, whether public or private, were drawn: so that the Norman tongue was of no extensive use here; nor was it till the time of Edward I. that French became of common use in the laws, parliamentary records, and law-books; and this was not the provincial dialect of Normandy, but the language of Paris.

It is believed that few were learned in the laws before the Conquest, except the clergy. The warlike condition in which that people lived, and the extreme ignorance which universally prevailed among the laity, left very little ability for the management of civil affairs to any but the clergy, who possessed the only learning of the times; in the reign

Miscellaneous
facts.

^f Tyrell, ii. 101.

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therefore of the Conqueror, in the great cause between *Lanfranc* and *Odo* bishop of *Baieux*, it was *Agelric* bishop of *Chichester* to whom they looked for direction. He was brought, says an antient writer², in a chariot, to instruct them in the antient laws of the kingdom, *ut legum terræ sapientissimus*. It was the same long after the Normans settled here.

In the time of *Rufus*, one *Alfwine*, rector of *Baton*, and several monks of *Abington* were persons so famous for their knowledge in the laws, that they were universally consulted, and their judgment frequently submitted to by persons resorting thither from all parts³. Another clergyman, named *Ranulph*, in the same reign obtained the character of *invictus confessor*. So generally had the clergy taken to the practice of the law, at that time, that a contemporary writer says, *nihil clericus nisi confessor*. The clergy seem to have been the principal practitioners of the law, and were the persons who mostly filled the bench of justice.

² *Textus Ross.*

³ *Eng. Hist. p. 121.*

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H E N R Y III.

Magna Charta—Tenures—Alienation—Morimain—Communia Placita non sequantur Curiam nostram—Justices of Assise—Amercements—Nullus liber homo, &c.—Precipe in Capite—Sheriff's Criminal Judicature—The Writ de Odio et Atia—Charta de Foresta—The Judicature of the Forest—Punishments—Charters confirmed—Statutum Hibernie—Statute of Merton—Of Commons—Of Special Bastardy—Ranks of Persons—Of Villenage—Of Free Services—Of Serjeanty—Scutagium—Homage and Fealty—Of Wardship and Marriage—Of Gifts of Land—by whom—to whom—Of Simple Gifts—Of Conditional Gifts—Estates by the Courtesy—Of Reversions—Gifts ad Terminum—Livery—Rights—Testaments—Ecclesiastical Jurisdiction therein—Of Descent—De Partu Supposito—Of Partition—Dower.

HAVING travelled through the early periods of our law, through the profound darkness of the Saxon times, and the obscure mist in which the Norman constitutions are involved, we approach the confines of known and established law. In the reign of Henry III. begins the order of statutes on which legal opinions may be founded with certainty. Whatever statutes were passed before this reign, and whatever remembrance we may have of them in annals and histories of the time, they are considered as little more than the remains of antiquity, that illustrate indeed the enquiries of the curious, but add nothing to the body of legal learning. *Magna Charta*, and

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the statutes of Merton and Marlbridge, passed in this reign, lie within the pale of the English law, as now understood; and furnish topics for argument, and grounds for judicial decision. From this time, the history of our law becomes more authentic and certain. The constitutions now made, produced determined effects; we can trace in what manner they were afterwards altered and modified; can generally fix the æra of such alterations; and can always rest secure in the probability of our deductions, while we behold the consequences of them in the present state of our law.

IF the statutes furnish authentic documents on which we may rely with confidence, the grounds and principles of the law are investigated and discussed by an author of this reign, whose work may be considered as the basis of all legal learning: the treatise of Bracton will enable us to speak decidedly and fully upon every title in the law, whether civil or criminal. The sketch we have just given from Glanville will now be filled up, and its deficiencies supplied; many of the obscure hints, the doubts, and ambiguities with which that author abounds, will be elucidated; and the whole of our law explained with consistency, and upon undeniable authority. These are the materials from which the juridical history of this king's reign is to be collected. For the matter which they furnish, it may not be raising the expectations of the reader too high, to promise him a full gratification of his thirst for legal antiquities, and the knowledge of judicial proceedings in all their branches. It is rather to be feared, that every one may not intirely assent to the reasons which induced us to enter so minutely into the detail of things; it is thought, however, that it would be less pardonable to give a scanty relation, where the sort of information which is most likely to engage the curiosity of a lawyer depends, very often, upon circumstances and passages apparently trifling.

THE reign of this king, and the remainder of this History, will be divided, conformably with the nature of the materials from which it is formed, into the alterations made by statute, and those made by usage and the decisions of courts. These two sources of variation will be pursued separately, and the amendments made by either stated distinctly, and by themselves. We shall first consider the statutes, and then the decisions of courts. In the present reign, we begin with *Magna Charta*, 9 Hen. III. that being the earliest statute we have on record.

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HENRY III. in the first year of his reign, on the 12th of November 1216, being then only nine years old, by the advice of Gualo the pope's legate and of the earl of Pembroke, in the grand council of the realm renewed the Great Charter which had been granted by his father, together with such alterations and amendments as the circumstances of the times had made necessary^a. In the September or November following, a new *Magna Charta* was sealed by the pope's legate and the earl of Pembroke, with several additional improvements; at which time the clauses relating to the Forest were first thrown into a separate charter, making the *Charta de Foresta*^b.

WHEN the king was declared of age, it was thought that so important an act of his infancy as this, should be confirmed; accordingly, in the ninth year of his reign he confirmed the act of the pope's legate and the earl of Pembroke; and granted *Magna Charta* and *Charta de Foresta* in the form in which they had sealed it, and as we now have them^c.

THUS was the text of *Magna Charta* and *Charta de Foresta*, after many alterations, finally settled; nor has there in succeeding times been any amendment made therein. The solicitude of later ages was to obtain frequent confirmations, and a strict observance of these grand

^a 2 Bla. Tracts, ii. Intr. 42.

^b Ibid. p. 54. 60.

^c Ibid. p. 67.

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pillars of our constitution; by occasional interpretations to explain any difficulties which might appear in the construction of them; and to enlarge the benefits they were designed to confer. What were the benefits, liberties, and advantages secured to the people by these famous charters, and what is the form and style in which they are conceived, it is now our business to enquire.

THE copy of *Magna Charta* in our statute-book is taken from the roll of 25 Ed. I. and is only an *Inspeimus* of the charter of the ninth of Henry III. so called from the letters patent prefixed in the name of Edward I. *INSPEXIMUS Magnam Chartam domini Henrici quondam regis Angliæ patris nostri de libertatibus Angliæ, in hæc verba.* Then follows *Magna Charta* nearly in the form of that granted by Henry III.

MAGNA CHARTA contains fifty-seven chapters, composing a rhapsody of ordinances for the settling or amendment of the law in divers particulars at that time anxiously contended for. The whole is strung together in a disorderly manner, with very little regard to the subject matter. If we were to judge, from the face of the instrument itself, of the chief design of the barons in obtaining this charter, we might be inclined to think, that their great object was to ascertain the services and burthens arising from tenures; for the first six chapters are wholly confined to that subject, and many others relate incidentally to the same point; the consequence of which is, that many parts of this famous charter have become obsolete, and, to a modern reader, almost unintelligible. Other parts of it, however, are extremely worthy of notice, even at this day; as they, at the time, contributed to confirm, if not establish, certain branches of our juridical constitution; and, what is more important, to lay down certain general principles, which have had an extensive influence on our law in all its branches ever since; as our civil liberty and private rights became thereby better defined, and were

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considered as settled on the firm basis of parliamentary recognition.

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To explain in what manner this was done, it will be proper to state at length the substance of *Magna Charta*; which we shall attempt in an order differing from that in which the text appears, but which will, perhaps, bring the contents of it into a clearer light than the original appears in. We shall first speak of such provisions as are of a more general or miscellaneous nature; then of those which relate to tenures and property; after which will follow the regulations ordained for the administration of justice.

Magna Charta.

THE address and general preamble to the charter are deserving notice, as they shew the form in which these solemn acts were usually authenticated: it is addressed in the name of the king. "To all archbishops, bishops, abbots, priors, earls, barons, sheriffs, provosts, officers; and to all bailiffs, and other our faithful subjects, who shall see this present charter, greeting. Know ye, that we, unto the honour of Almighty God, and for the salvation of the souls of our progenitors and successors kings of England, to the advancement of holy church, and amendment of our realm, of our mere and free will^a, have given and granted^b to all archbishops, bishops, abbots, priors, earls, barons, and to all freemen of this our realm, these liberties following, to be kept in our kingdom of England for ever."

SUCH is the manner in which the provisions of *Magna Charta* are introduced; after which comes the first chapter, containing a general grant in the following terms: "First, we have granted to God, and by this our present charter have confirmed, for us and our heirs for ever, that the church of England shall be free, and shall have all her whole rights and liberties inviolable. We have granted also and given to all the freemen of our realm,

^a *Spontanea et bonâ voluntate nostrâ.*

^b *Dedimus et concessimus.*

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"for us and our heirs for ever, these liberties under-
 "written, to have and to hold, to them and their heirs, of
 "us and our heirs for ever." What these liberties were
 we shall now enquire.

It was ordained, that the city of London shall have all the ancient liberties and customs which it had been used to enjoy; and that all other cities and towns, and the barons of the cinque or other ports, should possess all their liberties and free customs^f. As many exactions had been made during the reigns of Richard and John for erecting bulwarks, fortresses, bridges, and banks, contrary to law and right; it was declared, that^g no town or freeman should be distrained to make bridges or banks, but only those that were formerly liable to such duty in the reign of Henry II. a period which was often referred to, as an example for correction of enormities, and the due observance of the laws. For the same reason, none were to appropriate to themselves a several right in the banks of rivers, so as to exclude others from a passage there, or from fishing, except such as had that right in the reign of Henry II^h. All weirs in the Thames and Medway, and all over England, were to be destroyed, except such as were placed on the coastⁱ. One standard of weights and measures was established^k throughout the kingdom.

A provision was made respecting merchant-strangers, which evinces how very early a regard was had to the interests of trade. Before this, it should seem, that merchant-strangers, though in amity, used to be laid under certain prohibitions^l; for it was now provided^m, that all merchants, unless they were before publicly prohibited, should have safe and sure conduct in the seven following instances: 1st, to depart out of England; 2dly, to come into Eng-

^f Mag. Chart. ch. 9.

^g Ch. 15.

^h Ch. 16.

ⁱ Ch. 23.

^k Ch. 25.

^l 2 Inst. 57.

^m Ch. 30.

land; 3dly, to tarry here; 4thly, to go through England, as well by land as by water; 5thly, to buy and sell; 6thly, without any manner of evil tolls; 7thly, by the old and rightful customs. But this was only while their sovereign was in amity with our nation; for, in time of war, merchant-strangers, being enemies, who were here at the beginning of the war, were to be attached, without harm of their body or goods, till it was made known to the king or his chief justiciar ^a how our merchants were treated in the enemy's country, and they were to be dealt with accordingly.

THESE are the provisions of the Great Charter that are not easily reducible to any of the following heads, to which we are now proceeding. We shall first speak of the regulations relating to tenures. If any earl, or baron, or other person holding of the king in chief by knight service, died, and at the time of his death his heir was of full age, it was ordained, that he should have his inheritance upon paying the old relief; that is, the heir of an earl was to pay for his earldom 100l. the heir of a baron for his barony 100 marks, and the heir of a knight 100 shillings for every knight's fee; and so in proportion ^b.

Tenures.

NOTWITHSTANDING these reliefs of baronies and earldoms are called the old relief, we have before seen, that in the time of Glanville such reliefs were not fixed by law, but depended on the pleasure of the prince, and therefore must have been a ground of continual discontent; the knight's relief here prescribed is the same as it was in Glanville's time ^c.

IN cases where the heir was within age at the death of his ancestor, it was provided ^d, that the lord should not have the ward of him, nor of his land, before he had taken homage of him. This was in confirmation of the common law stated by Glanville ^e, and was

^a *Capitalis iudiciarius nostrus.*^b Ch. 2.^c Vid. ant. 127.^d Ch. 3.^e Vid. ant. 129.

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now enacted for better security of heirs against their lords; namely, that before the lord should have benefit of the wardship, he should be bound to two things: 1st, to warrant the land to the heir; 2dly, to acquit him from service, and other duties to be done and paid to all other lords; both which the lord was bound to do, if he had accepted homage of his tenant. It was moreover declared, in confirmation likewise of the common law, that when such a ward came of age, that is, to twenty-one years, he should have his inheritance without relief, and without fine. Notwithstanding such heir within age was made a knight, and so might be judged fit to do the service of a knight himself, it was provided, that though this might discharge his person from ward, yet his land should remain in the custody of his lord till he came of age¹.

The obligation to restore the inheritance to the heir, without destruction or waste, was ascertained more precisely, though in the spirit of the old common law². It was enjoined³, that the keeper of the land (that is, the guardian of such an heir within age) should only take reasonable issues, and reasonable customs and services, without making destruction and waste of his men, his villains, or his goods. Where a committee of the custody of the king's ward, whether he was the sheriff, as was then usual, or any other person, was guilty of waste or destruction, he was to make recompence; and the land was to be committed to two discreet men of that fee, who were to account for the issues. Likewise, where the king gave or sold the custody, and waste was done, the custody was to be forfeited, and to be committed to two persons of that fee, as before mentioned. It was also directed, that those who had the custody of the land of such an heir⁴, should, out of the issues and profits thereof, keep up the houses, parks, warrens, ponds, mills, and other things ap-

¹ Mag. Chart. ch. 3.² Vid. ant. 114, 115.³ Ch. 4.⁴ Ch. 3.

pertaining to the land, and should deliver to the heir, when he came of full age, all his land, sowed with ploughs and other implements, at least in as good condition as he received it in. It was provided, that all the above-mentioned regulations should be observed in the custody of archbishoprics, bishoprics, abbeys, priories, churches, and dignities vacant that belonged to the king; with this exception, that the custody of *them* was never to be sold. As to abbeys not of the king's foundation, it was declared¹, that the patrons of them, if they had the king's charters of advowson, or had an ancient tenure or possession, were to have the custody of them during their vacancy.

In addition to these provisions it was moreover declared, as it had been before held at the common law, that heirs should be married without disparagement².

SEVERAL abuses of purveyance as well as of tenures were removed or corrected. No constable of a castle or bailiff³ was to take corn or cattle of any one who was not an inhabitant of the town where the castle was, but was to pay for the same; and even if the owner was of the same town, it was to be paid for in forty days. No constable of a castle was to distrain a knight to give money for keeping castle-guard, if he would do it in person, or cause it to be performed by some other who was able, and he could shew a reasonable excuse for his own omission; if a person liable to castle-guard was in the king's service, he was, for the time, to be free from castle-guard⁴. No sheriff or bailiff of the king was to take any horses or carts for the king's use but at the old limited price; i. e. says the statute, for a carriage and two horses, 10d. per day; for three horses, 14d. per day: the demesne cart, however, or such as was for the proper and necessary use of any ecclesiastical person, or knight, or any lord, about his demesne lands, was to

¹ Mag. Chart. ch. 33.

² Ch. 6. Vid. ant. 116.

³ Ch. 19.

⁴ Ch. 20.

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remain exempt, as had been by the ancient law. Again, neither the king nor his bailiffs or officers were to take the wood of any person for the king's castles, or other necessities to be done, but by the licence of the owner^a. These limitations upon services of tenure and upon purveyance were great benefits to the subject, and so far protected him against these arbitrary claims.

CERTAIN declarations were made as to the nature of tenure, in some instances. The king's prerogative in cases of ward was declared in the following manner. If any held of the king in fee-farm^a, or by soccage, or in burgage, and held lands of another by knight's service, the king was not, by reason of such fee-farm, soccage, or burgage-tenure, to have the custody of the heir, nor of the land holden of the fee of another; nor was he to have the custody of such fee-farm, soccage or burgage, except knight's service was due out of the said fee-farm; nor was the king, by occasion of any petit serjeanty, by a service to pay a knife, an arrow, or the like, to have the custody of the heir, or of any land he held of any other person by knight-service^b; all which seem to be only more explicit declarations of what the common law was thought to be before^c.

It was deemed proper to guard against such conclusions as might be founded on the above, or on any other prerogative, in case of baronies escheating to the crown; it was therefore declared, that if any man held of an escheat, as for instance, of the *honour* (for so it was in such case called) of *Wallingford, Nottingham*, or any other escheat, being in the king's hands and being a barony, and died, his heir should give no other relief to the king than he did to the baron, when it was in his hands; nor should he do

^a Mag. Chart. ch. 21.

^b That is, an inheritance with a rent reserved in fee, equal to, or at least a fourth of that for which the

same land had been let to farm.

^c Ch. 27.

^d Vid. ant. 115.

any other service to the king than he should have done to the baron. The king was to hold the honour or barony as the baron held it, that is, of such estate, and in such manner and form, as the baron held it; and he was not, by occasion of such barony or escheat, to have any escheat but of lands holden of such barony; nor any wardship of any other lands than what were holden by knight's service of such barony, unless he who held of the barony held also of the king by knight's service *in capite*^a; from which it appears, that he who held of the king must hold of *the person of the king*, and not of any honour, barony, manor, or feignory^b.

THESE provisions about tenures were followed by one which was designed for the preservation of tenures in their pristine vigour and importance. We have seen^c what alteration had gradually taken place in the original strictness with which alienation of land had been restrained; so that as the law now stood where the tenure was of a common person, the tenant might in many cases make a feoffment of part thereof, either to hold of himself, or of the chief lord. A feoffment of the latter kind seemed no way prejudicial to the lord, who still saw the land in possession of a person who was his homager: but when the tenure was reserved to the feoffor, the homage, as far as regarded that portion of the land, passed from the lord to the feoffor. These subinfeudations, as they, in a degree, stript the mesne lord of his ability to perform his services, were found very prejudicial to the objects of the feudal institution; and therefore the following regulation was made^d, namely, that, for the future, no freeman should give or sell any more of his land, than so as what remained might be sufficient to answer the services he owed to the lord of the fee.

In what manner this prohibition affected tenants *in capite*, has been somewhat doubted. Some have held, that the law never allowed tenants *in capite* to alien with-

^a Mag. Chart. ch. 31.

^b 2 Inst. 64.

^c Vid. ant. 43. 104, 205.

^d Cl. 32.

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out a licence from the king, and paying a fine: some, that after this act, land so aliened without licence was forfeited to the king. Others again held, that the land, in such case, was not forfeited, but was seised in the name of a distress, and a fine was thereupon paid for the trespass; of which latter opinion is lord Coke. This question remained undetermined for the space of one hundred years, when it was settled by stat. 1 Ed. III. c. 12. which declares, that the king should not hold such land as forfeit, but that a reasonable fine should be paid in the chancery.

BUT in the case of common persons who aliened in violation of this prohibition, the law was different; for it is the common opinion, that the act was interpreted in this manner; when a tenant aliened part of his land contrary to this act, the feoffor himself, during his life, could not avoid it; but his heir, after his decease, might avoid it by force of this act; but if the heir had joined with his ancestor in the feoffment, or had confirmed it, neither he nor his heirs could ever avoid it; and if the heir had entered under the sanction of this act, the alienee of part might plead, that the service whereby the land was holden, could be sufficiently provided for out of the residue; upon which issue might be taken. There are many precedents where this provision had been so tried, before the statute of *quia emptores*, 18 Ed. I. which repealed this prohibition, and gave every one free liberty to alien his land in part, or in the whole^b, with a reservation of the services to the chief lord.

Mortmain.

OTHER means by which the end of tenures was defeated, were alienations in mortmain; for in consequence of these, the military service decayed, and lords lost their fruits of tenure. Lands given to religious houses continued in an unchangeable perpetuity, without descent to an heir; and therefore never produced the casualties of wardships,

^b 2 Inst. 66.

escheats, relief, and the like. On this account many landholders would insert a clause in the deed of feoffment, *quòd licitum sit donatori rem datam dare, vel vendere cui voluerit, exceptis VIRIS RELIGIOSIS*¹. It was now endeavoured to put a stop to these gifts by a general provision; which was conceived in a way best calculated to meet the devices then made use of to elude the force of restrictions, like that just mentioned. It was ordained, that^k it should not, for the future, be lawful for any one to give his land to a religious house, and to take back again the same land to hold of that house; nor, on the other hand, should it be lawful for a religious house to take lands of any one, and lease them out to the donor. Moreover, if any one was convicted of giving his land to a religious house, the gift was to be void, and the land was to accrue to the lord of the fee. This provision is abridged, and the effect of it declared by the statute of mortmain in the next reign^l. "Of late," says that act, "it was provided, that religious men should not enter into the fees of any, without licence and will of the chief lord of whom such fees be holden immediately;" because if they did, the lord would claim them as forfeit. It is plain from this chapter of *Magna Charta*, particularly from this exposition of it, that gifts of land to religious houses were thereby prohibited generally, that is, even in cases where the religious house did not give the land back to hold of the house, but kept it to themselves in their own hands^m.

AMONG other severities attending the condition of tenures, that which related to the dower and marriage of widows was not the least. It seems from the following passages, that some impediments were thrown in the way of their just rights, which are not noticed in any document we have hitherto met with. It was declared, that a

¹ Bract. fol. 13.

² Ch. 36.

¹ 7 Ed. I.

² 2 Inst. 74, 75.

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widow^a, immediately after the death of her husband, should, without any difficulty, have her *maritagium*^b, and inheritance; and should give nothing for her dower, her marriage, or her inheritance, which her husband and she held the day of her husband's death; by which must be meant some estate in *frank-marriage*, or *conditional fee*. She was, moreover, to continue, if she pleased, in the chief house of her husband, unless it was a castle, for forty days (called her *quarantine*) after his death; within which time her dower, if not assigned before, was to be assigned to her: and when she departed from the castle, a competent house was forthwith to be provided for her, where she might have an honourable residence till the assignment; and in the mean time she was to have reasonable estovers of common. For her dower she was to have assigned to her a third part of all the lands of her husband which were his during the coverture, unless where it happens that she was endowed of less at the church-door. By this description, the widow's dower was enlarged; for in the time of Glanville, it was to be a third of such land

^a Ch. 7.

^b Lord Coke interprets this passage thus: "Widows are without difficulty to have their marriage (that is, to marry where they will, without any licence or assent of their lords) and their inheritance," &c. a construction which has two strong reasons against it. For, first, *maritagium* is generally used by the writers of this period for an estate in *frank-marriage*, and coupled as it here is with *hereditas*, it seems to require that sense. Truly, This construction is directly contrary to the latter part of this very chapter of *Magna Charta*, where it is expressly declared that widows *shall not* marry without the assent of their lord. Indeed, lord Coke found it convenient to comment away the meaning of this passage also, which he has done in these words: "That is to be understood where such licence of marriage in

"case of a common person was due by custom, prescription, or special tenure; and this exposition is supported by constant and continual use and experience, et opinio interpretum legum consuetudo." (2 Inst. 18.) The latter position I admit most fully, and beg leave, upon the authority of it, to oppose the testimony of Bracton and Britton to that of our author. It is laid down by both of those writers, as will be shewn in its proper place, that this was the general law of the land; thus I do not mean to dispute, but that the law in lord Coke's time might be as he has delivered it in this place. This is one strong instance, among many others, that our best writers have fallen into the error of canvassing points of ancient law upon principles and ideas wholly modern.

only as the husband had at the time of the espousalsⁿ. It was ordained, that no widow should be distrained to marry, if she chose to live single; provided she would give security not to marry without the licence and assent of the king, if she held of the crown; nor without the assent of her lord, if she held of a common person: which last provision was in conformity with the spirit of the common law^o.

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THESE points concerning tenures, and the incidents of landed property, were ascertained by the Great Charter. The remainder of this ancient piece of legislation is taken up in reforming the modes of redress, and regulating the administration of justice.

NOTHING more required mitigation than the rigour with which the king's debts were in those times exacted and levied. This made it necessary to declare^p, that neither the king nor his bailiffs should seize any land or rent for a debt, so long as the goods and chattels were sufficient, and the debtor was ready to satisfy the demand. Further, the pledges of such a debtor, says the statute, shall not be distrained, so long as the principal is of sufficient ability; they are only to be answerable in his default; and they may, if they please, have the lands and rents of the debtor to reimburse themselves whatever they have paid for him.

WHERE the king's debtor dies, the king is to be preferred in payment of debts by the executor. If, says the charter, any one that holds of the king a lay fee^q should die, and the sheriff or bailiff shews the letters patent of the king's summons for a debt due to the king, the sheriff or bailiff may attach and inventory all the goods and chattels of the deceased that are found within the fee, to the value of the debt, by the *view*^r of lawful men; so that nothing may be removed till the king is satisfied; and

ⁿ Vid. ant. 100.

^o Vid. ant. 117.

^p Ch. 8.

^q Ch. 18.

^r Per visum legalium hominum.

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after that, the residue is to remain to the executors, to perform the will of the deceased: if nothing is due to the king, then all the chattels are to go to the use of the defunct (that is, to his executors or administrators), saving, says the statute, to his wife and children their reasonable parts; the latter part of which provision does not seem to remove any of the difficulties which were before noticed in the text of Glanville upon the subject of testaments¹.

A VERY plain rule of the common law was enforced by a declaration², that no man should be distrained to do more service for a knight's fee, or for any freehold, than was properly due. This provision would not have been necessary, unless the remedy by distress had been lately abused, to compel a compliance with unjust demands.

THE most interesting part of this famous charter, as viewed by a modern reader, are the provisions for a better and more regular administration of justice. The effects of these are seen even in the present shape of our judicial polity, to the formation of which they contributed very considerably.

*Communio placita
non sequuntur
curiam nostram.*

THE first of these regulations ordains, that *communio placita non sequantur curiam nostram, sed teneantur in aliquo certo loco*³; the sense of which ordinance is, that suits between party and party shall no longer be entertained in the *curia regis* (whose stile, during this reign, was properly *placita quæ sequuntur regem*), which always followed his person, and might be held in several different places in the space of one year, to the great inconvenience of suitors, jurors, witnesses, and others; but shall be debated in some certain stationary court, where persons concerned may resort at all times for prosecuting and defending their suits.

THE operation of this provision must have had an immediate influence upon the two great courts of the king; namely,

¹ Vid. ant. 111, 112.

² Ch. 16.

³ Ch. 11. Vid. ant. 57.

that held before himself, and that which, though a part of it, was called the exchequer; for as both these attended the king wherever he resided, all suits there between parties were interdicted by the words of this law; and the former remained a tribunal for discussion of criminal matters only; the latter for the cognizance of causes concerning the revenue: while common pleas, as they were to be held in some certain place, seemed, naturally enough, to devolve upon the *bench*, or *justitiiarii de banco*, which had been lately established at Westminster, in aid of the two former courts, as we have before seen. From this period, the bench, or, as the return was, *coram justitiariis nostris apud Westmonasterium* (to distinguish it from the king's court, which sat at the Tower, and removed with his person), grew into more consideration; and in after-times, as it became the sole and proper jurisdiction for *communia placita*, was thence denominated *the common-pleas*. In what manner the other two courts recovered a sort of cognizance in common suits between parties, by means of different fictions, will be seen hereafter.

It was endeavoured to render the proceeding by assise still more expeditious, by ordaining justices to go a circuit once every year to take assises, instead of waiting till the justices itinerant came; which latter were perhaps not very regular, or, at least, not wished by the great barons to be very regular in their circuit, as they exercised a jurisdiction of a magnitude and extent that controuled the franchises of lords who had inferior courts. The statute^a directs, that assises of *novel disseisin* and of *mortaunceſſor* shall not be taken but in their shires; whereas we have seen, that writs of assise and *mortaunceſſor* were returnable in Glanville's time *coram me vel justitiis meis*, in the *curia regis*, or court before the king; but this was now altered, and they were, for the future, to be taken in

Justices of assise

^a Ch. 12.^b Vid. ant. 178. 190.

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the following manner. The king, or, in his absence out of the realm, the chief justiciar was to send justices into every county once a-year; and these, together with the knights of the county, were to take the assises there. Such matters as the justices could not determine on the spot, were to be finished in some other part of the circuit; and such as, on account of their difficulty, they could not determine at all, were to be adjourned before the justices of the bench, and there decided. This is said to be the first appointment of *justices of assise*; in consequence of which these writs were ever after made returnable *coram justitiariis nostris ad assisas, cum in partes illas venerint, &c.* *Assises de ultima præsentatione*^x, which hitherto had been taken in the king's courts, that is, *coram me vel justitiis meis*, were, for the future, to be heard before the justices of the bench only, and there finally determined; a provision which may be thought to be founded in abundant caution, when it had been before declared, that common pleas, of which this was certainly one, should not follow the king's court.

WHILE order was taken for ascertaining and governing the king's courts, some attention was given to the jurisdiction of the sheriff, where matters of less moment were agitated with some solemnity. The county court was to be held^y only from month to month, that is, not more frequent than once a month; and in counties where the interval of its sitting had been greater, that was still to continue. The sheriff or his bailiff was not to hold his tourn in the hundred more than twice a-year, namely, after Easter and Michaelmas, and that in the usual and accustomed place; and the view of frank-pledge was to be held by the sheriff at Michaelmas. This last provision was in order to keep up the old constitution so admirably contrived for preserving the peace, and the due order

^x Ch. 13.

^y Ch. 35.

of the decennaries. It was enjoined, that all mens' liberties should be maintained as in the reign of Henry II.; and that the sheriff should take no more for his frankpledge than was allowed in that reign. It is cautioned, in this same chapter, that the sheriff should seek no occasion or pretence either for holding his court oftener than is there directed, or taking any unreasonable fees. These injunctions about the sheriff's court were dictated probably by the jealousy that lords of franchises entertained concerning their own courts, with which the sheriff too much interfered.

THE practice of courts was considered, and the usage of the common law in some instances was adjusted and confirmed. It was endeavoured, by declaring the law more fully on that subject, to prevent all abuse of the *miseri-cordia*, or amercement, which we have had such frequent occasion to mention. A freeman, says the statute^a, shall not be amerced for a small default but after the manner of the default; and for a greater in proportion thereto, saving to him, in the language of Glanville, his *contenement*, or *countenance*: with respect to a merchant, saving to him, in like manner, his merchandize; and to a villain, except he was the king's villain, his wainage: from which provisions it appears to have been the intention, that these amercements should not be the complete ruin of a man. For the same reason also it was declared, that none of the said amercements should be assessed but by the oaths of honest and lawful men of the vicinage. Earls and barons, however, were not to be amerced but by their peers (which was done either by the barons of the exchequer, or in the court *coram rege*, in both which the *pares regni* were constitutionally judges^b), and according to their default^c; nor was a clerk to be amerced in proportion to his spiritual benefice, but after his lay-tenement, and, in like manner,

Amercements.

^a Ch. 14.^b Bract, fol. 116. b.^c *Delicti*.

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only according to his default*. All these provisions* were only to affirm and give a sanction to ancient usages, some of which have been before mentioned: upon this chapter, however, was afterwards framed the writ *de moderatâ misericordiâ*, for giving remedy to a party who was excessively amerced.

THE form of trial was intended to be adjusted by the following regulation, though the precise meaning of it has occasioned some doubt: *Nullus ballivus de cætero ponat aliquem ad legem manifestam, nec ad juramentum simplici loquelâ suâ, sine testibus fidelibus ad hoc inductis*†. Whether this means, that the defendant should not discharge himself by his own oath alone, without the oaths of other persons swearing to their belief of his assertion; or, that no defendant should be put to wage his law, unless the plaintiff supported his *loquela*, or declaration, by credible witnesses; or, as they were afterwards called, *sectatores*; has been a question with some writers. Several passages in Bracton seem to favour the latter opinion; and Fleta explicitly declares this to be the meaning of the provision†; if so, most probably the practice of bringing into court the *sectatores* of the plaintiff, was established by this clause‡. The defendant making his law by the oaths of others swearing with him, was an old usage§, in criminal cases at least, and as such is mentioned by Glanville; but it is not spoken of at all by that writer as a mode of proof for a defendant in civil suits; though we shall have occasion to mention it frequently in that light upon the authority of Bracton. From the manner in which the latter author speaks of a defence *per legem*, it seems to have been long in use; and from this passage in *Magna Charta*, we must conclude that it had been adopted from criminal to civil actions shortly after the time of

* *Dei. 11.*† *Vid. ant. 157.*‡ *Ch. 28.*§ *Flet. 137.** *Vid. ant. 25; in the note.*† *Vid. ant. 195, 198.*

Glanville. The *señtatores*, in this sense, constitute another novelty, of which there is no mention in Glanville. When it had become the practice to admit *señtatores*, for so they also were called, to make the defence, it appeared reasonable enough to require, as *Magna Charta* here does, that certain persons should, in like manner, be brought to make out the plaintiff's case. It may be conjectured from the name, that both these sets of persons were originally chosen from the *señtatores*, or suitors of court, who were there present, ready to transact such business of the court as might arise.

Of all the provisions made by this charter for the security of the person and property of the subject, none has so much engaged the attention and claimed the reverence of posterity as chap. 29, which contains a very plain and explicit declaration as to the protection every man might expect from the laws of his country. *Nullus liber homo capiatur, vel imprisonetur, aut disseisietur de libero tenemento suo, vel libertatibus, vel liberis consuetudinibus suis, aut utlagetur, aut exulet, aut aliquo modo destruatur. Nec super ibimus* (says the statute in the name of the king), *nec super eum mittemus, nisi per legale iudicium parium suorum, vel per legem terræ*; "nor will we take possession of his effects, but by the judgment of his peers" (which, as in another chapter, had in view the *comites et barones*^b; and not the trial by jury, as has been commonly but erroneously supposed), "or by some other legal process or proceeding adapted by law to the nature of the case." The statute goes on and says, *nulli vendemus, nulli negabimus, aut differemus rectum vel iustitiam*; whereby the king in his own person declares, that he will neither sell, deny, or delay to any man a due administration of the law^c.

Nullus liber homo, &c.

^b Vid. ant. 247.

^c Lord Coke conceives *ibimus* to signify the process of the court *coram rege*, and *mittimus* that of any court which derives its authority from a writ sent to it. But these words have a technical sense in the civil law, which

fully and more simply explains their meaning here. *Ite in bona alienius dicantur, qui in rerum possessionem a magistratu mittuntur*. Calv. Lex. Jur. It. As the former expressions in this chapter apply to the person and the *frankland*, it seemed natural to add such

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Præcipe in capite.

AMONG the regulations for the administration of justice, must be mentioned that respecting the writ of *præcipe in capite*; *breve quod dicitur*, says the charter, *Præcipe in capite de cætero non fiat alicui de aliquo libero tenemento, unde liber homo perdat curiam suam*. We have seen, that, in Glanville's time^u, the regular way was, that for land held of a private lord suits should be commenced in the lord's court, and that only writs concerning land held *in capite* should be returnable in the king's court. This course seems to have been sometimes not adhered to, and a writ of *Præcipe* for lands held of a private lord used to be brought sometimes in the *curia regis*, as if the land was held *in capite*. It was to prevent this prejudice to the lord's court, that the above provision was made; and since that, all writs of right of land held of any other than the king, have been invariably brought in the lord's court, though they might afterwards be removed by *pone*. That this provision was aimed only at writs of right, and not at other *præcipes*, is expressly declared by Bracton¹.

THESE were the regulations ordained for the settlement and improvement of our law relative to property, and the administration of civil justice. Some few provisions were made regarding our criminal law, though not of the same magnitude with the former.

Sheriff's criminal judicature.

As^e the distribution of justice, particularly that which concerns the lives and persons of individuals, should be in the hands of persons not only of discretion and judgment, but also well versed in the law, it was thought proper to ordain^m, that no sheriff, constable, coroner, or other bai-

such as would protect the goods and chattels. The trial by jury was never spoken of in these days as *judicium*, much less *judicium parium*. We hear of *veredictum*, *juramentum legatum hominum*, *jurata vicinæ*, and the like, all expressive of some sworn truth, or of the persons who swore it coming from the vicinage. Whereas the *pari regni* gave judgment, and not upon oath; so did the *scabatores*, in the county and other courts, who were the *pari* to all *liberi homines de comitatu*; and these latter came from the body of the county, and not from the vicinageⁿ.

^u Vid. ant. 172.¹ Bract. fol. 231.^m Ch. 17.^e Vid. ant. 24, 25.

liff of the king, should hold pleas of the crown: it is held, that ^a by this provision, the authority of the sheriff to hear and determine theft and other felonies was entirely taken away. But this alteration could not have been made by force of this statute alone; it must be remembered, that, in the time of Glanville, theft was not among the *placita coronæ*, but was tried by the sheriff ^b. In the time of Bracton, we find it was reckoned among the *placita coronæ*; and this change of its nature was necessary, before the present clause of *Magna Charta* could have the effect of removing it from the jurisdiction of the sheriff, as a plea of the crown. Whether this new denomination took place before or after the passing of *Magna Charta*, or in what period between the times of Glanville and Bracton, it is not easy or necessary to determine. This provision has been construed to apply only to hearing and determining; and therefore it was held, that the sheriff's power to take indictments of felonies and misdemeanors, as well as the coroner's to take appeals, still remained unimpeached; and in truth both were exercised for many years after, till a particular statute ^c was made to abolish the last remains of the criminal jurisdiction belonging to these ancient common-law judges.

It was declared, that a woman should not bring any appeal of death, except of the death of her husband, in the following words ^d: "No one shall be taken or imprisoned on account of the appeal of a woman brought for the death of a man, except for the death of her husband;" which is one, among many other articles of this statute, that is only a confirmation of the common law ^e.

^a 2 Inst. 32.

^b Vid. ant. 128.

^c 1 Ed. IV. c. 2.

^d Ch. 34.

^e Lord Coke, in his Commentary on this chapter, has laid it down, that a woman before this statute might

have an appeal of the death of any of her ancestors; but this opinion seems to have no foundation, and what has been laid before the reader in another place, shews the law to have been quite otherwise. Vid. ant. 199, 200. 2 Inst. 68.

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The writ de
odio et atia.

THE writ *de odio et atia* was rendered more attainable than it had hitherto been. It was ordained that this writ, in future, should issue *gratis*, and should never be denied¹. This is the first mention of this writ by name, though it has been alluded to in a former part of this History². This writ was one of the great securities of personal liberty in those days. It was a rule, that a person committed to custody on a charge of homicide, should not be bailed by any other authority than that of the king's writ; but to relieve a person from the misfortune of lying in prison till the coming of the justices in eyre, this writ used to be directed to the sheriff, commanding him to make *inquisition*, by the oaths of lawful men, whether the party in prison was charged through malice, *utrum relictus sit odio et atia*; and if it was found that he was accused *odio et atia*, and that he was not guilty, or that he did the fact *se defendendo*, or *per infortunium*, yet the sheriff, by this writ, had no authority to bail him; but the party was then to sue a writ of *tradas in ballium*, directed to the sheriff; whereby he was commanded, that, if the prisoner found twelve good and lawful men of the county who would be mainpernors for him, then he should deliver him in bail to those twelve. The writ, or inquisition *de odio et atia* had a clause in it, *nisi indictatus vel appellatus fuerit coram iustitiariis ultimo itinerantibus*; so that the inquisition was not in such case to be taken³. We see how important it was, that this writ should be attainable with as little expence and trouble as possible, to avoid the oppression of malicious prosecutors.

As to the forfeiture and escheat of lands for felony, it was declared, that the king would not hold them for more than a year and a day, and then they should go to the lords of the fee⁴; which was nothing more than the language of the law before⁵.

¹ Ch. 26.² Vid. ant. 198.³ Bract. 122, b. 123, a. b.⁴ Ch. 22.⁵ Vid. ant. 120.

It was declared, that escuage should be taken ^r as it was wont in the reign of Henry II. This is the last provision of this famous charter; and is followed by some general declarations and renunciations dictated by the solemnity of the occasion. The liberties and free customs belonging to all persons, spiritual or temporal, are saved; and the king declares, that "all the customs and liberties aforesaid, which we have granted to be holden within this our realm, as much as appertaineth to us and our heirs, we shall observe; and all men of this our realm, as well spiritual as temporal, as much as in them is, shall observe the same against all persons in like wise." For this grant of their liberties, the barons, bishops, knights, freeholders, and other subjects, granted a subsidy; and then, says the king, "we have granted to them, for us and our heirs, that neither we nor our heirs shall attempt to do any thing whereby the liberties contained in this charter may be infringed and broken. And if any thing should be done by any one contrary thereto, it shall be held of no force or effect."

To these solemn and repeated declarations respecting the sanctity of this charter of liberties, is added *hinc testibus*, containing a list of the greatest names in the kingdom: for as in these times no grant of franchises, privileges, lands, or inheritances passed from the king but by the advice of his council, expressed under *hinc testibus*, this was thereby rendered an act of the king, attended with every formality that could possibly render it binding. In this consideration of it, it is properly *charta*, or a charter, though in that form it received likewise the authority of parliament. To the end of the charter, as it stands in the statute-book, is subjoined the confirmation of it before mentioned to have been made in the 25th year of Edward I.

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Charta de Fo-
restâ.

THE *Charta de Forestâ* is likewise taken from the roll of 25 Edward I. and has a confirmation of that date prefixed to it, similar to that prefixed to *Magna Charta*. This charter, though of infinite importance at the time it was made, contains in it nothing interesting to a modern lawyer, any further than as it gives some specimen of the nature of the institution of Forest Law, and the burthens thereby brought on the subject. In this light, the Charter of the Forest is a curious remain of antient legislation. It contains sixteen chapters.

THE first chapter of this charter directed that all forests which had been afforested by Henry II. should be viewed by good and lawful men; and if it was proved that he had any woods, except the demesne, turned into forest, to the prejudice of the owner's wood, it was to be forthwith disafforested; but the royal woods that had been made forest by that king, were still to remain, with a saving of the common of herbage, and other things which any one was before accustomed to have ^a. This was the provision in relation to the forests made by Henry II. As to those made by the kings Richard and John, they, unless they were in the king's own demesnes, were to be forthwith disafforested ^a. The charter directed, that all archbishops, bishops, abbots, priors, earls, barons, knights, and free tenants, having woods in forests, should have them as they enjoyed them at the first coronation of Henry II. and should be quit of all purprestures, wastes, and assarts, made therein before the second year of Henry III. ^b Thus far were limits fixed to the extent of forests; and after these provisions a clause is added, by which all offences therein were pardoned.

In point of regulation it was ordained, that regarkers, or rangers, should go through the forest to make their regard, or range, as was the usage before the first coronation of

^a Ch. 1.^a Ch. 3.^b Ch. 4.

Henry II. ^c The inquisition, or view for the *lawing* or *expedition* of dogs, was to be had when the range was made, that is, from three years to three years; and then it was to be done by the view and testimony of lawful men, and not otherwise. A person whose dog was found not *lawed*, was to pay three shillings. No ox was to be taken for *lawing*, as had been before customary; but the old law in this point of expedition was to be observed, namely, that three claws of the fore-foot should be cut off by the skin: and, after all, this expedition was to be performed only in such places where it had been customary before the first coronation of Henry II. ^d It was ordained that no forester, or bedel, should make scotal, or gather gerbe, oats, or any corn ^e whatever, nor any lambs, or pigs; nor make any gathering at all, but upon the view and oath of twelve rangers, when they were making their range. Such a number of foresters was to be assigned, as should be thought necessary for keeping the forest ^f. It was permitted to every freeman to agist his own wood, and to take his pannage within the king's forest; and for that purpose he might freely drive his swine through the king's demesne woods; and if they should lye one night in the forest, it should be no pretence for exacting, on that account, any thing from the owner ^g. Besides the above use of their own woods, freemen were permitted to make in their woods, land, or water within the forest, mills, springs, pools, marlpits, dikes, or arable grounds, so as they did not inclose such arable ground, nor cause a nuisance to any of their neighbours ^h: they might also have ayries of hawks, sparrow-hawks, falcons, eagles, and herons; as likewise the honey found in their own woods ⁱ. Thus was a degree of relaxation given to the rigorous ordinances of William the Conqueror, who had

^c Ch. 5.^d Ch. 6.^e *Bladom*.^f Ch. 7.^g Ch. 9.^h Ch. 12.ⁱ Ch. 13.

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appropriated the lands of others to the purpose of making them forest; the owners thereof were now admitted into a sort of partial enjoyment of their own property.

It was permitted that any archbishop, bishop, earl, or baron, coming to the king, at his command, and passing through the forest, might take and kill one or two of the king's deer, by view of the forester if he was present; if not, then he might do it upon the blowing of a horn, that it might not look like a theft. The same might be done when they returned*. No forester, except such as was a forester in fee, paying a ferm for his bailiwick, was to take any chiminage, as it was called, or toll for passing through the forest; but a forester in fee, as aforesaid, might take one penny every half-year for a cart, and a halfpenny for a horse bearing a burthen; and that only of such as came through by licence to buy bushes, timber, bark, and coal, to sell again. Those who carried brush, bark, and coal upon their backs were to pay no chiminage, though it was for sale, except they took it within the king's demesnes†.

The judicature
of the forest.

PART of this charter consisted of matters relating to the judicature of the forest. It was ordained, that persons dwelling out of the forest should not be obliged to appear before the justices of the forest, upon the common or general summons; but only when they were impleaded there, or were pledges for others who were attached for the forest‡. *Swainmotes* (which were the courts next below those of the justices of the forest) were to be held only three times in the year; that is, the first at fifteen days before *Michaelmas*, when the agistors came together to take agistment in the demesne woods; the second was to be about the feast of St. *Martin*, when the agistors were to receive pannage: and to these two swainmotes were to come the foresters, verderors, and agistors, and no others. The third swainmote was to be held fifteen days before St. *John*

* Ch. 11.

† Ch. 14.

‡ Ch. 2.

Baptist; and this was *pro facinatione bestiarum*; to this were to come the verderors and foresters, and no other; and the attendance of such persons might be compelled by distress. It was moreover directed, that every forty days throughout the year, the foresters and verderors should meet to see the attachments of the forest *tam de viridi quam de venatione*, as well for vert as venison, by the presentment of the same foresters.

SWAINMOTES were to be kept in those counties only where they had used to be held^a. Further, no constable, castellan, or other, was to hold plea of the forest, whether of vert or venison (which was a prohibition similar to, and founded on a like policy with one in *Magna Charta* about theft); but every forester in fee was to attach pleas of the forest, as well for vert as venison, and present them to the verderors of provinces; and after they had been inrolled and sealed with the seal of the verderors, they were to be presented to the chief forester, or, as he was afterwards called, the chief justice of the forest, when he came into those parts to hold the pleas of the forest, and were to be determined before him^b. The punishments for breach of the forest law were greatly mitigated. It was ordained, that no man should thenceforth lose either life or limb^c *for hunting deer*; but if a man was convicted of taking venison, he was to make a grievous fine; and if he had nothing to pay, he was to be imprisoned a year and a day, and then discharged upon pledges; which if he could not find, he was to abjure the realm^d. Such were the tender mercies of the forest laws! Besides such qualifications of this rigorous system, it was ordained, that those who, between the time of Henry II. and this king's coronation, had been outlawed for the forest only, should be in the king's peace,

Punishments.

^a Ch. 8.^b Ch. 16.^c *Pro venatione*.^d Ch. 12.

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without any hinderance or danger, so as they found good pledges that they would not again trespass within the forest¹.

THESE were the regulations made by the Charter of the Forest; which concludes with a saving clause in favour of the liberties and free customs claimed by any one, as well within the forest as without, in warrens and other places, which they enjoyed before that time. To the whole is subjoined a like confirmation as that to *Magna Charta*, in the 25th year of Edward I.

MANY copies of the Great Charter and Charter of the Forest were put under the great seal, and sent to the archbishops, bishops, and other dignified ecclesiastics, to be safely kept; one of which remained in Lambeth palace till a very late period². It is said, however, that Henry, when he came of age, cancelled, in a solemn manner, both those charters at a great council held at Oxford; and that he did this by the advice of Hubert de Burgh, chief justiciary, who, of all the temporal lords, was the first witness to both the charters. Notwithstanding this, we find in the 38th year of this reign, A. D. 1254, a solemn assembly was held in the great hall at Westminster, in the presence of the king; when the archbishop of Canterbury and the other bishops, apparelled in their pontificals, with tapers burning, denounced a sentence of excommunication against the breakers of the liberties of the church and of the realm, and particularly those contained in the Great Charter and Charter of the Forest; and not only against those who broke them, but also against those who made statutes contrary thereto, or who should *observe* them when made, or presume to pass any judgment against them; all which persons were to be considered as *ipso facto* excommunicated: and if any ignorantly offended therein, and, being admonished, did not reform within

Charters confirmed.

¹ Ch. 15.

² It is mentioned by Bishop Burnet to have been among the papers of archbishop Laud.

fifteen days, and make satisfaction to the ordinary, he was to be involved in that sentence *. We shall see, in the succeeding reigns, how often these two charters were solemnly recognized and confirmed both by the king and parliament.

THE first public act which presents itself in the statute-book after the two charters, is the *statutum Hibernie de coheeredibus*, 14 Hen. III. which, from a consideration of the matter and manner of it, has been pronounced not to be a statute †. In the form of it, it appears to be an instruction given by the king to his justices in Ireland, directing them how to proceed in a certain point where they entertained a doubt. It seems, the justices itinerant in that country had a doubt, when land descended to sisters, whether the younger sisters ought to hold of the eldest, and do homage to her for their several portions, or of the chief lord, and do homage to him; and certain knights had been sent over to know what the practice was in England in such a case. The following is stated as the usage of England at that time, agreeing with what is laid down both by Glanville and Bracton ‡. If any one holding *in capite* died, leaving daughters co-heiresses, the king had always received homage of all the daughters, and every one of them held *in capite* of the king; and accordingly, if they were within age, the king had ward and marriage of every one. And again, if the deceased was tenant to any other lord, and the sisters were within age, the lord was to have the ward and marriage of every one; but with this difference, that the *eldest only* was to do homage for herself and her sisters; and when the younger sisters came of age, they were to do their service to the lord of the fee by the hands of their eldest sister: the eldest, however, was not on that account to exact of the younger homage, ward, or any other mark of subjection; for they were all equal in consideration of

Statutum Hibernie.

* Vid. Pickering's Statutes.

† Vid. ant. 89.

‡ Old Abridg. Tit. Homage.

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law, and deemed as one heir only to the inheritance : and should the eldest have homage of her sisters, and demand wardship, the inheritance would be in a manner divided ; so that the eldest sister would be *simul et semel* seignioress, and tenant of the inheritance, that is, heirs of her own part, and seignioress to her sisters : which could not well consist together ; the law allowing no other distinction to the eldest sister but the chief mansion. Besides, if the eldest sister should receive homage of the younger, she would be seignioress to them all, and should have the ward of them and their heirs ; which was always guarded against by the policy of the law, that never entrusted the person or estate of a minor to the custody of a near relation ; which is the very reason given by Bracton [†] why the younger sisters should not be in ward to the eldest [‡].

THE other statutes made in this reign are the *provisiones*, or *statutum de Merton*, 20 Hen. III. and the statute *de anno bissextili*, 21 Hen. III. after which there appears none till the 51st year of this king.

Statute of Merton.

THE statute of Merton contains eleven chapters, which are arranged with as little order as those of *Magna Charta*. The several alterations or confirmations of the law thereby made were as follow. We have just seen what provision had been made on the subject of ward and marriage, by *Magna Charta* : To secure lords in this valuable casualty, it was now further ordained, that when heirs were forcibly led away, or detained by their parents or others, in order to marry them, every layman who should so marry an heir, should restore to the lord who was a loser thereby the value of the marriage ; that his body should be taken and imprisoned till he had made such amends ; and further, till he had satisfied the king for the trespass. This provision related to heirs within the age of fourteen : as to those

* Bract. §§.

† The Introduction of the English law into Ireland, and the progress it

made there, may very properly become an object of consideration in another place.

of fourteen, or above, and under full age, if such an heir married of his own accord without his lord's licence, to defraud him of his marriage, and his lord offered him reasonable and convenient marriage without disparagement; it was ordained, that the lord should hold the land beyond the term of his age of twenty-one years, till he had received the double value of the marriage, according to the estimation of lawful men, or according to the value of any marriage that might have been *bona fide* offered, and proved of a certain value in the king's court.

THUS far the interest of lords was secured. The following provision was to protect infants against an abuse of this authority in their lords. If any lord married his ward to a villain or burghers where she would be disparaged, the ward being within the age of fourteen, and so not able to consent, then, upon the complaint of the friends, the lord was to lose the wardship till the heir came of age; and the profit thereof was to be converted to the use of the heir, under the direction of her friends. But if the heir was fourteen years old and above, so as to be by law of capacity to consent to the marriage, then no penalty was to ensue^a. Again, if an heir, of whatever age, would not consent to marry at the request of his lord, he was not to be compelled; but when he came of age, and before he received his land, he was to pay his lord as much as any would have given for the marriage; and that, whether he would marry or not; for as the marriage of an heir within age was a lawful profit to the lord, he was not to be wholly deprived of it, but was to be recompensed in one way or other^b.

SOME further provision was made respecting dower. It was provided by *Magna Charta*, that widows should give nothing for their dower; in order still further to secure to them a ready assignment of dower, it was now ordained, that persons convicted of deforcing widows of their dower,

^a Ch. 6.^b Ch. 7.

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should pay in damages the value of the dower, from the death of the husband up to the time of giving judgment for recovery thereof; and they were moreover to be in *miseri cordiâ* to the king ^c. Because it had been doubted, whether, as a widow received her dower in the condition it was when her husband died, she should not leave it in like manner to the reversioner in the condition it was at her death; to remove this doubt, it was ordained, in favour of widows, that they might bequeath the crop upon their lands held in dower, as well as that upon their other lands ^d.

USURY, which we have before seen ^e was treated with little lenity by our old law, was now put under a particular restraint. It was provided, that usury should not run against any person within ^f age, from the death of his ancestor, whose heir he was, until he arrived at his full age: a provision which was dictated, no doubt, by the consideration that the profits of the infant's lands went to his guardian during the wardship, and that he was thereby disabled from paying the annual interest. This new regulation was to be without any prejudice to the principal and the interest which had accrued in the life-time of the ancestor ^g.

Of commons.

A PROVISION made about commons of pasture was of great importance to lords of manors. When a lord, having great extent of waste ground within his manor, infeoffed any one of parcels of arable land, it was usual for the feoffee to have common in such wastes, as incident to his feoffment: and this was upon very good reasons: for as the feoffee could not plough and manure his ground without beasts, and they could not be sustained without pasture; the tenant used to have this allowance of common for his beasts of the plough as appendant to his tenancy; and from thence arose common appendant. Right of common, therefore, was founded upon the general interest of agriculture, and the particular one of the lord, whose land was thereby cultivated and improved. We have seen ^h, that a

^c Ch. 1.

^d Ch. 2.

^e Ant. p. 86.

^f Ch. 5.

^g Ant. p. 149.

remedy by assise had been devised to maintain tenants in possession of this right: but, it seems, this remedy had been pushed too far, and began to encroach upon the demesne and original right of the lord; who, having suffered his tenants to range at large over his wastes for which he had not yet found any use, could hardly appropriate any part thereof without the imputation of encroachment on his tenants, and being liable to an assise of disseisin of common of pasture. To prevent such usurpations upon the lord, and adjust the reasonable claims both of lord and tenant, the following regulation was made: that when such feoffees brought an assise of novel disseisin for the common of pasture, and it was therein recognized before the justices, that they had as much pasture as was sufficient for their freeholds¹, and that they had free ingress and egress from their freehold to their pasture; then the person against whom the assise was brought should go quit for all the lands, wastes, woods, or pasture, which he had converted to his own use. But should it be alledged that they had not sufficient pasture, nor sufficient ingress or egress, the truth thereof was to be enquired of by the assise; and if it was found as alledged, then they were to recover their seisin by view of the jurors, and the disseisor was to be amerced, as in other cases².

THE administration of justice was aided by a law concerning repeated disseisins, or, as they were afterwards called, *re-disseisins*. It was ordained, that when any person recovered seisin of his freehold, before the justices in eyre, by assise of novel disseisin, or by confession of the disseisors, and seisin had been delivered by the sheriff; if the same disseisors again disseised the same tenant of the same freehold, and were convicted thereof, they should forthwith be committed to prison, till they were discharged by the king upon payment of a fine. The way of bringing such contemners of the law to punishment is thus directed by

¹ *Ad tenementa sua.*² Chap. 4.

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the statute: When complaint was made at the king's court, the parties injured were to have the king's writ directed to the sheriff, in which a relation was to be made *de disseisinâ factâ super disseisinâ*, of a disseisin upon a disseisin; and the sheriff was to be thereby commanded, that he, taking with him the keepers of the pleas of the crown^b, and other lawful knights, should go to the place in question, and there, in their presence, by the first jurors and other neighbours and lawful men, make diligent inquisition of the matter: and if the party was convicted, he was to be dealt with as before mentioned; if not, the plaintiff was to be amerced. The sheriff was not to entertain such a plaint without the king's special command, namely, by writ. What is here said of lands recovered in assise of novel disseisin, extended to those recovered by assise of mortuanceffor, or in any proceeding *per juratam*^c.

AN alteration was made in the limitation of time for bringing certain writs. In a writ of right, as the law had been for some years, a descent might be conveyed *à tempore Henrici regis senioris*; but it was now ordained, that there should be no mention of so distant a time, but only *à tempore Henrici regis avi nostri*. Writs of mortuanceffor, *de nativis*, and *de ingressu*, (a writ which had lately sprung up, and of which more will be said hereafter) were not to exceed *ultimum reditum domini regis Johannis patris nostri in Angliam*, king John's last return from Ireland into England; nor writs of novel disseisin, *primam transfretationem domini regis Henrici, qui nunc est, in Paschaniam*^d.

^b Vid. ant. where these are supposed to be the *coroners* of the County.

^c Ch. 3.

^d Ch. 8.

Henry I. began his reign A. D. 1100. Henry II. A. D. 1154. King John went to Ireland in the 11th year of his reign, and returned the same year; between that and the 20th Henry III. were about 25 years. Henry III. went into Gal-

cony for the first time in the 5th year of his reign; so that there were about fifteen years between that and the statute of Merton. [2 Inst. 94, 95.] Writs of mortuanceffor before this act were *post primam exonationem Henrici II.* which was 10th October, 1154. Those of novel disseisin were *post ultimam transfretationem Regis in Normanniam*, which was in 1164, the 30th year of his reign. Vid. ant. 189.

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BEFORE another chapter of this statute is mentioned, it may be convenient to recollect, that there were two kinds of suits; suit *real*, as it was afterwards called, and suit *service*. Suit real was, in respect of residence, due to a leet, or tourn; suit service was, by reason of tenure of land, due to the county, hundred, wapentake, or maner whereunto a court baron was incident. Every one who held by suit service, was required to appear in person, because the *suitors* were judges in those courts; and if he did not, he would be amerced; which was a heavy grievance; for it might happen that he had lands within divers of those feignories, and the courts might all be kept in one day; therefore, as he could attend personally only at one place, it was provided by this act, that every freeman who owed suit to the county, trithing^m, hundred, wapentakeⁿ, or to the court of his lord, might freely make his attorney to do suit for him^o. This permission did not enable him to do the same at the leet, or tourn, because he could not be within two leets, or two tourns^p.

It is recorded in the statute of Merton, that the question about the legitimacy of children born before wedlock was still agitated between the clergy and common lawyers; the former maintaining their legitimacy, according to the constitution of pope Alexander; the latter alleging this to be contrary to the common law; as hath been mentioned before^q. The bishops now urged in council, that when the king's writ of bastardy was directed to them, to enquire whether a person born before wedlock was entitled to the inheritance, they neither could nor would give any answer thereto, because the question was put in a special way, and not in the form required by the church, which was general, whether bastard or not; and therefore, to make an end of the controversy, and the diffi-

Of special
bastardy.

^m A district containing three hundred.

ⁿ Another name for a hundred.

^o Ch. 10.

^p 2 Inst. 99.

^q Vid. ant. 85.

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culty at once, they prayed the nobles to consent, that all such as were born before matrimony should, consistently with the law of the church, be deemed legitimate, and be intitled to succeed to the inheritance, equally with those born within wedlock¹. But the statute says, *omnes comites et barones unâ voce responderunt, quod nolunt leges Angliæ mutari, quæ hucusque usitatæ sunt, et approbatæ*². This point of difference between the canon law and the law of the land did not rest here. In the same year, a solemn agreement was made between the king, bishops, and barons in council assembled, and by this the practice was settled, as will be shewn when we come to speak more particularly on the subject of bastardy. The nobles, who resisted the inclination of the ecclesiastics with such firmness, had no scruple to propose an innovation which had no object but to accommodate these potent landholders, at the expence of the liberty of the subject; but in this they were opposed by the king, who refused his consent: the proposal was, that they might imprison in a prison of their own all persons that were found trespassing in their parks and vivaries³.

In the next year, there follows in the statute-book a public instrument which is intitled, the statute *de Anno Bissestili*, 21 Hen. III.; but which is, in truth, nothing more than a sort of a writ, or direction, to the justices of the bench, instructing them how the extraordinary day in the leap-year was to be reckoned, in cases where persons had a day to appear at the distance of a year, as on the esoin *de malo leñi*, and the like. It was thereby directed, that the additional day should, together with that which

¹ This piece of canonical jurisprudence is actually adopted in the law of Scotland. They consider the subsequent marriage as having been entered into when the child was begotten; and therefore it is con-

fined to the case of such women, whom the father, at that period, might have married. *Edik. Prin. b. 1. tit. 7. sect. 37.*

² Ch. 9.

³ Ch. 11.

went before, he reckoned only as one, and so of course within the preceding year.

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AFTER this, there are no statutes (except the confirmation of the charters 38 Hen. III. which has been mentioned already) till the fifty-first year of this king. During this interval of thirty years, great progress was made towards bringing the law to that state of consistency and learning to which it arrived in this reign; there is also the strongest proof^a that the treatise of Bracton was written within this space of time; and that the account of the law given by that author, does not include the alterations made therein by the statutes passed in the 51st and 52d years of this king. It seems therefore the most natural order, to postpone the consideration of those statutes till we have taken a view of the previous state of the law; from whence we may proceed to the alterations made therein by those statutes.

THIS view of the law, as it stood towards the end of the present reign, will include in it not only a fuller account of what has been before delivered from the authority of Glanville, but likewise the numerous additions, variations, and improvements that had been made since his time. This will be extracted, as we promised, from that great ornament of our antient jurisprudence, the treatise of Bracton, from which such parts will be selected as are thought best suited to the design of this History of our judicial polity. As the plan we here propose will lead us to reconsider all or most of the topics which were examined in the reign of Henry II. it will be very difficult to avoid the appearance of repetition. This will be guarded against as much as possible; and we trust that the reader will be satisfied that no subject is brought before him a second time, but where the nature of the enquiry and the progress of the History made it absolutely necessary.

^a Vide post.

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Ranks of persons.

WE shall begin our short view of the law in this reign with some observations on the rights of persons. The ranks of freemen are stated by Bracton to be these; dukes, earls, barons, *magnates*, or vavafors, knights, and those who were plain freemen. Vavafors, he says, were persons *magnæ dignitatis*, and were so called *tantum vas sortitum ad VALETUDINEM* *. The condition of *servi*, or *villani*, as they were commonly called, is more particularly described by this author than by Glanville, and the nature of that state may be tolerably well collected from his account of it. The *servus*, though he was generally considered as *in potestate domini*, and not *sui juris*; yet, as to life and limb, he was intitled to the protection of the law. The lord might take from his villain every thing he had, even his principal piece of property, which was usually his *waynagium*, or implements of husbandry; the rule being, that *quicquid per servum acquiritur, id dominus acquiritur* †. These *servi* did not escape from their condition by going off the land of the lord, if they continued in the habit of returning; and sometimes they used to be permitted to absent themselves for a length of time from the lord's lands, and employ themselves in trade, upon paying to the lord a fine called *chevagium*, or chiefage, as an acknowledgement of their subjection and villenage. But if they left the lord's land without returning regularly, or ceased to pay their *chevagium*, they were then considered as fugitives; and when they were once become fugitive, they were to be pursued and demanded by the lord, both within liberties and without; for which purpose the aid of the king's officers might be had ‡: and after such claim had been made, the *servus*, though he was not taken till after a year had elapsed, might be detained; but if no such claim had been made, then, at the end of a year, the *servus* would be privileged, and considered as free. So strictly was claim

* Bract. 5. b.

† Ibid. 6.

‡ Ibid. 6. b.

required

required to be made, that if the lord, after the lapse of three or four days only, without making any claim, had taken him any where *extra villenagium*^a, beyond the limits of his villenage, he would have been liable to an action for the imprisonment.

It seems, that villains in the king's demesnes were of different kinds. There were those who had been such before the Conquest, and who, in consequence of the polity then established, were permitted to hold their land in villenage^b, by villain and uncertain services, and who were to do every thing which their lords commanded them. But in the disorder of that revolution, many freemen were dispossessed of their lands by the lords to whom they were allotted, and were afterwards permitted to hold them in villenage, with the burthen of doing some villain offices, which however were certain and specified. These persons were, according to Bracton, sometimes called *glebae adscriptitii*, because, so long as they did the appointed services, they had the privilege *not to be removed* from the land; and were indeed freemen: for though they did villain services, yet it was not in their own personal right, but on account of their tenement, which was held in villenage, though, says Bracton, a sort of privileged villenage^c. "There was," says the same authority, "another holding in the king's demesne manors, which was by the same villain customs and services as the former, and yet was not villenage; nor were the tenants *servi*; nor did they derive their title from the Conquest, as the former did, but by covenant with their lords; so that some of them had charters, and some not; and these, if ejected, might recover seisin by assise, which none of the former could. Besides these, there were also tenures by soccage, and knight's service, in the

^a *Extra villenagium*, that is, "out of his state of villenage," or beyond the lord's villain-territory.

^b Vide ante, p. 29.

^c Bract. 7.

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"king's demesnes." These latter, says Bracton, were *ex novo feoffamento* and *post Conquestum*; by which he seems to intimate his opinion as to the origin of the two principal tenures, those in soccage, and by knight-service^d.

A VILLAIN might also become free by manumission; which was a solemn and express act of declaring him free. There were other acts of the lord which were construed to amount to a declaration of a villain's liberty, because they put him into a condition incompatible with a state of servitude. Thus, if a lord was to receive homage of his villain, or should, without any express manumission, give land to his villain, *habendum et tenendum liberè* to him and his heirs, though no homage was done, such gift was considered as an intimation that the donee should become a freeman. Nevertheless, if a gift was made to hold *per liberum servitium*, it was otherwise; there being, according to Bracton, a difference between holding *liberè* and *per liberum servitium*; for as a tenure in villenage would not make a freeman a villain, so a holding by free service would not make a villain free, unless it was preceded by homage^e.

Of villenage.

BRACTON speaks of two orders of villains: namely, those who held in *pure villenage*, and those who held in *villain soccage*. In the former, the service was uncertain and indeterminate; so that the villain, according to his expression, 'did not know in the evening what was to be done in the morning, but was to do every thing that was commanded him: in the latter, the service was certain; and yet the holding was not *liberum tenementum*, or freehold. Neither of these could alien their lands, as freeholders could; and if they did, it might be recovered at law^f: but the way in which a villain soccman was to make a transfer of his estate, was this: he was first to make a surrender of it to the lord, or, if he was not present him-

^d Bract. 7. b.^e Ibid. 24. b.^f Ibid. 26.

self, to his steward^a, and from his hands the conveyance was to be made to the purchaser; and this was considered as the gift of the lord, in whom, and not in the villain sokeman, the freehold resided^b. Bracton does not say whether those who held in pure villenage had even the power of transferring their lands in this limited way; and it should seem, they had not yet obtained such privilege.

WE are enabled to speak more particularly of tenures Of five services. than we did in the reign of Henry II.; they had now become more defined, were better understood, and treated with much more refinement. Tenure depended on the services reserved at the time of the feoffment; and therefore, to understand the nature and variety of tenures, it will be necessary to consider more particularly the clause of *reddendum*, by which the services were reserved in deeds of feoffment. When a donation was made by a private person, it was usual to express in the deed, with some precision, whatsoever was to be rendered to the donor in compensation for the thing given. Thus a gift was made sometimes *pro homagio et servitio*, for homage and service; sometimes for service only, without homage. If it was intended to create a knight's fee, the proper reservation would be *pro homagio et servitio*; but in the creation of a soccage-tenure, it would not be so proper; as fealty only, and not homage, was due for soccage-land: and indeed should homage have really been done, yet this would not entitle the chief lord to wardship and marriage; for ward and marriage did not so properly follow the homage, as the service, which in fact, and which alone, made a tenure, either military or soccage. Thus it often happened that homage was not required even in military tenures; as where one made a gift to his eldest son and heir, or a brother to a younger brother, such gifts were usually made without reserving homage, lest the donor should be ex-

^a *Servienti*.^b *Bract.* 26.

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cluded from succeeding to the inheritance by the rule, *nemo potest esse dominus et hæres*. For the same reason, gifts, when made to a younger son, used to be, *pro servitio tantum, tenendam de me totâ vitâ meâ sibi et hæredibus suis, et post mortem meam de capitalibus dominis pro servitio quoad illam terram pertinet*. When the service was reserved in this way, the elder son might be heir to the younger, because there was no homage to constitute a *dominium*: if the gift had been *tenendam de capitalibus dominis*, it would have excluded him from the wardship also. In like manner, if a gift was made by the father to the eldest son, whether it was *pro servitio* or *pro homagio*, if it was to hold of the chief lord of the fee, and he died in the life of the father, the younger brother would succeed, and the father be excluded from the wardship; if he was a minor, the ward and marriage would belong to the chief lord, and if of full age, the relief likewise¹.

c THE reservation was sometimes *reddendo* so much *per annum* at certain times, or *faciendo* such and such services and customs, *pro omni servitio, consuetudine seculari, exactione, et demandâ*; by which all secular demands that belonged to the lord in right of the tenement were remitted. It must be observed of services and customs, that some belonged to the lord of the fee, and some to the king, corresponding with the distinction beforementioned between *suit service* and *suit real*². Of the latter kind, says Bracton, were *sessio ad justitiam faciendam*, as in writs of right; *ad pacem*, to sit in judgment on a thief; and *pro asforciameto curie*. To the donor of the land belonged such services as were due in recompence of the thing given, as rents, whether in gold or silver, in monies numbered; as if it ran *reddendo inde per annum decem aureos, argenteos*; or whether it consisted in fruits and profits of the ground, *reddendo inde per annum decem coros tritici*, four quarters of barley, four

¹ Bract. 34. b.

² Vid. ant. 265.

barrels of oil, or the like. Sometimes the reservation was made optionally; as, *reddendo inde per annum* so many gilt spurs, or sixpence, or a pound of pepper, or cumin, or wax, or a certain number of gloves; in which cases it¹ was at the option of the tenant which of them he would pay. Some services were to be performed to the lord of the fee, and consisted in doing some act at certain seasons; unless such services were specified, they would not be demandable; as where it was said, *et faciendū inde festam ad curiam domini sui, et bœredum suum, de quindenā in quindenam, &c.* or, *faciendū inde* so many ploughings or reapings, and the like; all which belonged to the lord of the fee, and were due out of and in right of his farms and tenements, and therefore were not personal, but feudal or predial services.

A PERSON might infeoff another to hold *by serjeanty*, which was of different kinds: some such services belonged to the lord who infeoffed; some to the king. Thus, for instance, when a person was to hold by the service of riding with his lord^m, or of holding the lord's pleas, or serving his writs within a certain district, or feeding his dogs or hounds, keeping his birds, finding him in bows and arrows, or carrying them, and innumerable like services; all these were called serjeanties. Services being divided into such as were called *forinsic* and such as were denominated *intrinsic*, all the abovementioned they considered in a particular manner as *intrinsic*, because they were of necessity to be expressed in the charter; and they were likewise reserved to the lord of the fee, and had not any reference to the king's army or the defence of the realm: in such tenure no ward or marriage accrued to the lord, any more than in soccage. These were usually called *petit serjeanty*, to distinguish them from such as related to the king only. A serjeanty of

Of serjeanty.

¹ Brañ. 35.^m Which tenants, says Brañton, were usually called *Red Knights*.

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this latter kind was^a, when a person was infeoffed by the service of finding one or more men to go with the king upon any military expedition with some kind of accoutrement; and from such a serjeanty, whether held of the king or a private person, there were due to the chief lord the ward and marriage of the heir^o.

It was before said, that the above services which were specified in the deed were called *intrinsic*. This term and its opposite were not wholly confined to express, that services were, or were not in the charter; for some other services, though expressly named in the charter of seoffment, were termed *forinsic*, because they belonged to the king, and not to the chief lord. These were performed without the tenant appearing in person, for he might satisfy the king, some way or other, for the service: they were due as accident or necessity made them requisite, and were called by various names. They were not only termed generally *forinsic*, as they belonged to the king, but had various other names of a more specific import. They were sometimes called *scutagium*, sometimes *servitium domini regis*; the meaning of which was this: they were called *forinsic*, because the service was done *foris* abroad, that is, *extra servitium* due to the chief lord; *scutagium*, because it related *ad scutum*, and the military service; *servitium regis*, because it belonged to the king, and not to the lord; and a seoffment by either of these latter appellations was con-

^a It might be expected that Bracton should call this latter *magna serjeantia*, to distinguish it from the other kind; but he does not. In another part of his book we are told by this author, that serjeanty was divided into *magna* and *parva*, with respect to its *value*, and as it should seem not with any distinction between a service performed to the king, and to a common person. This value appears not to have been very accurately defined. He says, that,

according to some, it was a great serjeanty if valued at 720 shillings; and those, says he, might be called *parva serjeanty* that were worth half a mark. (87. b.) Whatever difference of opinion there was about the name, there seems to have been none about the consequence of the respective services, namely, in what cases ward and marriage was demandable by the lord, and in what not.

^o Bract. 25. b.

sidered as the same thing: yet if a charter gave land *faciendo inde forinsecum servitium*, &c. the service, or the substitute for service, was to be expressed; as by the service of one knight's fee, or more; by the scutage of a hundred shillings; and the like^r.

THERE were other customs and dues which were neither intrinsic nor forinsec, but were rather, says Bracton, *concomitants* of services regal or military, and of homage. These were relief, marriage, and wardship, which need not be expressed in the charter; because if homage and regal service preceded, it followed that these belonged to the chief lord, whether it was a knight's service, or a serjeanty relating to the army. There were other customs and dues which, Bracton says, were not called services, nor the concomitants of services; as reasonable aid to make the eldest son a knight, or marrying his eldest daughter; which aids were *de gratiâ*, and not *de jure*^s, and were in consideration of the lord's necessities; for they were only to be demanded of his freemen in cases of necessity. These aids, too, were considered as personal, and not predial; for they respected the person, and not the fee, as may be collected from the terms of the king's writ which used to issue to the sheriff, commanding him, *quod juste et sine dilatione habere faciat tali rationabile auxilium de militibus liberè tenentibus suis in ballivâ suâ*, &c. As these aids were not to be levied at the pleasure of the lord, respect was to be had, in assessing them, to the circumstances both of the tenant and lord, so as the lord might be relieved without oppressing the tenant; or, as Bracton says, *quod auxilium accipienti cederet ad commodum, et danti ad honorem*^t.

A MAN might be infeoffed by divers kinds of services; as, by the service of one penny, and rendering scutage (that is, when demanded for particular occasions, as before-men-

^r Bract. 36. b.

^s Vid. ant. 127.

^t Bract. 36. b.

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tioned), and by one or more of the serjeanties above noticed. If the render was to be only in money, without any scutage, or serjeanty; or if two services were required optionally, as to give some certain thing *pro omni servitio*, or a certain sum of money; such a holding was called *focage*: but though it was only for the payment of one farthing, if scutage and regal service were added thereto, or if any serjeanty was reserved, it was considered as knight-service¹. The creation of all these tenures depended on the pleasure of the feoffor; for whatever might be the service he was bound to perform towards his feoffor, he might exact either more or less, upon making a feoffment to another. Thus a tenant by knight's service might infeoff another in focage, or make a grant in villenage. Again, he might require knight's service, though he held only in focage²: and in such case, as well as in other, the tenant was protected against the chief lord by the warranty of the mesne, who stood between them.

THE different kinds of tenure appear, from the above enquiry, to be these: some were by military service, since called knight's service, others by serjeanty; for which homage was to be done to the chief lord, because of the forinſic and regal service, and of that which related *ad ſcutum*, and the military calls for the defence of the country. Another was a holding *in focagio libero*, in free focage, where the service to the chief lord consisted in money, and nothing was due *ad ſcutum et ſervitium regis*: this was called focage from *ſaccus*, a plough; because the tenants thereof were deputed, as it should seem, merely to be cultivators of the ground. In this tenure the ward and marriage belonged to the nearest relations; and though homage should *de facto* be done for such land, as it sometimes was, the chief lord was not on that account intitled to the ward and marriage, as those casualties did not always,

¹ Bract. 37. b.

² Ibid. 36.

though they usually did, follow homage. There was another kind of foccage, called *villain foccage*, where homage was never done, but only the oath of fealty was taken; the lord being interested to see that his villain did not, by any surprize, become his homager *.

WE are next to consider the circumstances of tenure, the principal of which were *homage*, *fealty*, and *relief*. Much stress was laid on homage, to which was ascribed greater efficacy than to any other part of this system, as it was the tie of feudal connection between lord and tenant. Homage is therefore defined by Bracton, to be that legal bond by which a lord is held and bound to warrant, defend, and quiet his tenant in his seisin against all mankind, for a service performed by him, as expressed in the deed of gift; and, on the other hand, that obligation by which a tenant was equally bound to preserve his faith towards his lord, and to do his proper service; which connection, as has been before shewn, is thus expressed by Glanville: *tantum debet dominus tenenti, quantum tenens domino, præter solam reverentiam* †.

Homage and fealty.

HOMAGE was to be done at the time of the gift being made, either before or after seisin: if seisin was not delivered, the homage, says Bracton, had no effect ‡. Homage was to be done several times by the same tenant to the same lord, if for different freeholds. It was due for all lands, tenements, and rents; and for every thing else which was held by any of the tenures before-mentioned §. Homage was not due for a tenement that was held only for a term, (which included an estate for term of life) but *fealty* only. The person who was to do homage, says Bracton, was to seek his lord wherever he could be found; he was to approach him with reverence, and put both his hands between those of his lord: by which was meant to be signified on the part of the lord, protection, defence,

* Bract. 77. b.

† Ibid. 78. b.

‡ Ibid. 79.

§ Ibid. 79. b.

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and warranty; on the part of the tenant, reverence and subjection; and he was to pronounce in that posture these words: *Devenio homo vester de tenemento quod de vobis teneo, et tenere debeo, et fidem vobis portabo de vitâ et membris et terreno honore, contra omnes gentes, salvo fide debitâ domino regi, et hæredibus suis*; which agrees in substance with the form in Glanville's time*. After this he was to take his oath of fealty, the form of which is not mentioned by Glanville, and is as follows: *Hoc audis, domine N. quod FIDEM vobis portabo de vitâ & membris, corpore et catallis, et terreno honore: sic me Deus adjuvet, et hæc sancta Dei evangelia*. The difference between homage and fealty was this; that in the oath of fealty, which was the lesser obligation, the tenant engaged to bear his faith to his lord; in the other, he in addition thereto said, *Devenio vester HOMO*, that is, he became his homager.

HOMAGE was not to be done in private, but in some public place, where every body had access; as in the county or hundred court, or in the court of the lord, in the presence of many persons, that the lord might have witnesses of the tenant being bound to him. Again, it was requisite that a diligent examination should be made at the time, whether the person doing homage was intitled to the land; as whether he was right heir to the person last seised; what was the kind and size of the freehold; whether he held it in demesne, or in service; or what part thereof in one or the other*; all which was to prevent either the lord or the tenant being deceived. The effect of homage was such, that this caution seemed highly necessary; for when a person had done homage to one, who turned out not to be his true lord, yet he could not recede from the obligation of homage, without the judgment of some court, so long as he held the land for which he did it.

THERE were many ways in which the homage was dissolved: as, if either lord or tenant did any thing to the disherison of the other; in the former case, the lord was to lose his *dominium*; in the latter, the tenant was to lose his tenement. Again, should the lord die without heirs, the homage on his part was gone, but it revived in the person of the next superior lord, and still continued in the person of the tenant: the same, if the lord committed felony. In these cases, the superior lord could not waive the homage which was to commence between him and the inferior tenant; for the tenant would then be deprived of his warranty. Besides, it might happen that by the feoffment the tenant was bound only to the service of a penny, while the superior lord was bound by the feoffment he had made to the mesne lord, to the warranty of a hundred librates of land; and there is no doubt, but, in such case, a lord would gladly renounce his claim of homage, if the law would permit him. Nor would it avail the lord to say, that the tenant was not infeoffed by him, and that he claimed nothing in the homage; for as there might be several superior lords, so there might be several tenants one below another; and the chief lord of all held the lowest tenant bound to him by the ties of homage, because he was within his fee, though *per medium*; and when that *medius*, or mesne lord was taken away for any cause whatsoever, the connection between the chief lord of all and the inferior tenant became immediate; so that, one way or other, the inferior tenant was within the homage of the superior lord*. To illustrate this by an instance: if I infeoff *A.* and *A.* infeoffs *B.* and *B.* infeoffs *C.* and so on; then every tenant, from the first to the last, would be my tenants, and I their lord; the only difference being, that the first would be immediate tenant, the others so *per medium*,

* Bract. 2o. l. 1.

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WE have been shewing how the obligation of homage might cease in the person of the lord, and remain in the person of the tenant. In like manner might the homage cease in the person of the tenant and continue in that of the lord: as where the tenant parted with the whole inheritance, and infeoffed another to hold of the chief lord, then the tenant was absolved from the homage; that is, the homage was wholly extinguished as to him, whether the lord consented or not, and commenced in the person of the alienee, who now was bound to the lord; and should the feoffee re-infeoff the feoffor to hold of the same chief lord, the homage of the tenant would thereby be revived. The homage would cease also when the tenant died without heirs, or committed any felony; in which cases the tenement *escheated* to the chief lord. The tie of homage and fealty was likewise dissolved, when the tenant disavowed the services by which he held, or denied that he held of the lord at all; in which case the lord had two remedies: he might either waive the forfeiture of the tenement, and proceed for the recovery of the services; or avail himself of the tenant's default, and demand the tenement by a writ of *escheat*, or ^b by a writ of right. Should the tenant do any atrocious injury to his lord, or side with his enemy, by giving advice or assistance against his lord (except it was with the king, or the superior lord of all, to whom he had done allegiance), or do any thing to the disherison of, or put violent hands on, his lord; all these were breaches of faith which dissolved the homage on the part of the tenant. It must be observed, that homage remained in force between lord and tenant as long as the heirs of both parties continued (which tenure was therefore, in after-times, called *homage auncesfrell*); but upon the failure of any of them, the homage ceased, and could be revived in the persons of others only by some new

cause. A tenant might decline holding his tenement, and so dissolve the homage: he might, says Bracton, also surrender the tenement and homage to the lord *propter capitales inimicitias*, and so dissolve the homage, that he might be at full liberty to prosecute an appeal against him.

It seems, that, in general, the lord could not *attorn*, as they called it, or transfer to another the homage and services of his tenant against his consent, particularly the homage; for by so doing he might subject him to a person who was his declared and inveterate enemy. A slight enmity, however, was not an objection, where the law allowed, as it did in some cases, such an attornment even against the tenant's consent. The most usual way of attorning the homage was, on a fine in the king's court, where the homager was to be summoned to shew cause why the homage should not be done to the other person; and if he could not shew sufficient reason to the contrary, it would be attached without his concurrence. There were other instances, where homage might be attorned; as when land was given in marriage; when land was sold for redemption of the lord's person; in both which cases it might be attorned, unless any particular reason could be shewn to the contrary. This restraint upon the attornment of homage was founded on other reasons besides those beforementioned; as homage was the bond by which the tenant claimed the warranty and *excambium* of his lord, it was right that the lord should not have the power of transferring this obligation to another, who might be indigent, and not able to answer the warranty. This restriction was wholly in favour of the tenant, for whose benefit, indeed, homage seemed principally calculated; and if it was just that a lord should not be at liberty to decline the homage of the tenant, it was equally so that he should not attorn it without his assent.

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ALTHOUGH the law imposed this restraint as to homage, yet service might be attorned in all cases without requiring the assent of the tenant; and the person to whom it was attorned might distrain for it, without the tenant being able to make any resistance thereto^d. In such cases, some thought, that should the distress be for the homage and service both, it ought to cease as to the homage, though it held good as to the service; distress being incident to service, and belonging of course to the person who was entitled to the service. Yet a tenant was not to be oppressed by an attornment of service, any more than by an attornment of homage; it was adviseable therefore for the tenant, in order to secure himself from any unreasonable demands of his new lord, to get from him a charter, granting, that he would not demand more services than were due, and charging himself with a warranty and *recambium*, in the same manner as the first lord was bound. If the lord refused to receive the homage, the tenant had several remedies. In the first place, the service, which the tenant was not bound to without homage, was lost to the lord; and should homage be forced upon the lord by a judgment of court, the arrears of service were still lost. If the homage was refused publicly by the lord, the tenant might attorn himself to the next superior lord; and if he refused, to the next; and so on to the king, who was the chief lord of all; and if they all refused, the tenant was quit of all demands for service. But should any of them accept it, the immediate lord, who had refused it, could never recover the homage or service; though he would, on account of his wilful refusal, be still bound to warranty, notwithstanding the person to whom the tenant did homage had the service^e.

WHEN a mesne lord had accepted the homage and fealty of his tenant, and received the service, but had applied it

^d Bracl. 32.

^e Ibid. 32. b.

to his own use without acquitting him from the demands of the superior, and this was proved in the presence of good and lawful men; he might, in future, without any breach of law, satisfy the chief lord with his own hands, by doing his service to him; and yet the mesne lord would not, on that account, be discharged from his warranty^f. The remedy against the mesne lord, in such cases, was by a writ *de medio*.

AFTER homage was performed, the next thing for the heir to do, was to pay the relief; so called, says Bracton, because thereby the tenement and inheritance which was in the hands of the ancestor, *et quæ JACENS fuit per ejus decessum, RELEVATUR in manus hæredis*. The sums to be given on these occasions were settled by *Magna Charta*^g, except in tenure by sericanty, which was still left to the discretion of the lord. A relief was to be paid only in cases of succession, and never upon a change of tenant by buying or selling, or any other sort of purchase^h. It was to be paid to the next immediate lord, and no other: it was to be paid only once, and not upon the change of the lord; for though homage might be done several times, relief was to be paid only onceⁱ; so that the doubts expressed by Glanville on this head no longer existed^k. Another gift was to be made to a lord by the heir when he succeeded his ancestor, which was called a *heriot*. This was, however, in nothing like a relief; for it was given by all tenants, as well villain as free, and it rather came from the deceased than the heir: it was, says Bracton, when a man remembered his lord by the best beast, or second best beast he died possessed of, according to the custom of different places, and was rather *de gratiâ* than *de jure*; and, in fact, it related not at all to the inheritance^l.

^f Bract. 84.

^g Vid. ant. 235.

^h Bract. 84.

ⁱ Vid. ant. 125, 126.

^j Bract. 84. b.

^k Vid. ant. 125.

^l Bract. 86.

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Of wardship
and marriage.

THE subject of ward and marriage is treated by Glanville, and by Bracton, principally in the same way, and sometimes in the same words; we shall therefore touch upon such parts only as are stated somewhat differently, or are discoursed upon more at large by Bracton.

THE age of female wards was contended by some to be at fifteen years complete, both in military and soccage tenure; for, as to the former, they said, that she might have a husband who was equal to perform the military service^m; and therefore she might, with propriety, be reckoned of age before she was twenty-one years of age. But this opinion is combated by Bracton, who says, that the same principle might make her of age at an earlier period; and he therefore lays it down, that there is no distinction between male and female wards, in the respective tenures; and that it was only in the latter that females, (as we have before shewn of males) were to be considered as of age at fifteen years; at which time, says Bracton, a woman is able to manage her domestic concernsⁿ; which is a similar description to that given by Glanville^o, and adopted by Bracton, of the qualifications of an heir in burgage-tenure: and the latter author mentions fifteen as the proper age for the infancy of a tenant in soccage to cease, because he was then able to attend to affairs of agriculture.

It is laid down positively by Glanville, that if a person married his daughter and heiress without the assent of his lord, he should forfeit his inheritance; and that a widow who married without her lord's assent, should in like manner forfeit her dower^p. These two points are re-

^m Bracton says, another reason was given in favour of this early liberation from pupillage: *Femina magis doli copax est quam masculus, et motu suo sua vota mulieris quam viri.*

ⁿ To this Bracton adds, that she might *habere colne et keye*; which is thus explained by Spelman: COLNE

Saxonicè est CALCULUS; KEYE, CLAVIS; quasi ad spectat hic testis, ut femina congrua ætatis subretur, si COMPUTUM et CLAVES significat valere curare. Spelman, v. c. Bract. 86. b.

^o Vid. ant. 114.

^p Vid. ant. 116, 117.

cognised by Bracton as remnants of the old law, which had gone out of use. We have before seen what notice was taken of this cruel piece of law by *Magna Charta*; and it was now laid down by Bracton, that in both cases the lord was only intitled to a penalty; the measure of which, however, he does not mention¹.

WHEN an infant succeeded to inheritances that were held of different lords, the custody of the lands belonged to the respective lords of whom they were held; but the custody of the heir's person, and the marriage, which was the great source of emolument to the lord, could belong to one only; and there was some difficulty in ascertaining who that person should be. It is laid down generally by Glanville, that this should be the chief lord of whom the heir held his first fee²; and that the king, by his prerogative, was intitled to certain preferences. The manner in which both these claims were adjusted is more fully explained by Bracton.

As an exception to the prerogative, which gave to the king the custody of the heir and his lands of whomsoever they were held by knight-service, it is laid down, that if any held of the king *per feodi firmam*, or in soccage, or in burgage, or by *serjeanty*, to perform the service of finding him knives, or darts, or the like, the king should not have custody either of the heir, or of the lands he held of any one else; nor if he held of the king as of an honor or escheat; it being provided by *Magna Charta*³, that the tenure in such case should remain the same as it was when in the hands of the former possessor; though, even in case of escheats, if the heir held under a new grant from the king, the king's prerogative to wardship would prevail. This prerogative of the king, therefore, prevailed in respect only of a tenant who held of him *in capite* by military tenure, or by *serjeanty* to attend the king's person; and it only ex-

¹ Bract. 35.² Vid. ant. 115.³ Vid. ant. 118.

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IN soccage-tenure the wardship belonged to the next of kin, and not to the lord; and therefore, in general, if an heir had inheritances held in soccage of different lords, there could arise no question about priority of feoffment, to ascertain the right of wardship, as in military tenures; though it is said by Bracton, that by special custom in some places, and amongst others in the bishopric of Winchester, the lord had the wardship in soccage tenure, and in such cases, recourse must of necessity be had to priority to determine who was chief lord; yet this preference was only against lords whose tenures lay within the reach of the custom, and not against other persons².

THE first fee, in many cases, which constituted a person chief lord, and gave him the priority, ~~was the fee that was first delivered to the heir.~~ The lord was not to receive³ homage, before he had *delivered* the inheritance to the heir: the wardship and marriage could not be demanded from the infant heir, any more than relief, or any service could from the heir of full age, before homage; the delivery, therefore, of the inheritance was the first step towards acquiring a right to the wardship and marriage, and the receiving of homage completed the claim. It follows from hence, that as long as the homage of the ancestor had continuance, no delivery was to be made of the inheritance, and that homage continued during the ancestor's life, unless he had made any transfer of the land which broke the homage. Every transfer had not that effect. Thus, if a person holding by military service and homage, granted the land to his son and heir for life, to hold either of himself or of the chief lord, the homage still continued between the father and the chief lord; but it would

¹ Bract. 87. b.

² Ibid. 28.

have been broken, if the father had parted with the whole inheritance.

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THE ceasing of the homage and the delivery of the inheritance will be better understood by considering the following cases. Suppose *A.* having an inheritance, married *B.* having one also; both held of the same lord. They have a son. *A.* dies, leaving his wife *B.* alive: the inheritance of *A.* might be delivered to the heir by the lord, who would, in consequence, be entitled to homage, ward and marriage. But if *B.* the wife had died, leaving *A.* alive, it would be otherwise; because the homage done by *A.* in the name of his wife still continued; for it could not be dissolved during his life, as he was intitled to hold the land *per legem Angliæ*: the heir of *A.* therefore continued in the power of the father, during whose life he owed no homage to the lord; as two homages could not be done for the same land. And so it was, where-ever the heir was descended both from the husband and wife; but it was otherwise, where there was a second marriage, and he was descended only from one. As for instance, if the wife only had an inheritance, and the husband died first, leaving an heir, the inheritance could not be delivered during the life of the wife; and of course the lord would not have wardship and marriage: so if she married one or more husbands, there was still to be no delivery; and, of course, no ward or marriage, as long as she or any of her husbands lived: the same, if the wife died, leaving any husband alive: but as soon as the surviving husband died, then the inheritance might be delivered to the heir of the deceased wife by her first husband, and ward and marriage would follow.

Thus, as the preference depended upon the delivery of the inheritance, and that upon the death of the person in which, it might happen that the death of the husband and wife might fall so near as to leave a difficulty in determining which died first. In such case they used to recur, as
in

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in Glanville's time, to the first feoffment, and disregard the priority of delivery; and so they did, when the inheritance on the part of the father and that on the part of the mother were held of different lords, and were united in the person of one heir*.

THE guardian in soccage had the marriage of the heir and all other casualties and profits of wardship the same as the guardian in military tenure; and what is very remarkable, the right of the guardian in soccage was so much considered, that the law allowed the *apparent* next of kin to take, notwithstanding he was a bastard and illegitimate*. This made a guardianship in soccage as great an object as that in military tenure; and the struggle for the marriage of the heir did not lie only between the different lords of whom he held in military tenure, but, if he also held any soccage lands, there might be a contest between the lord in military tenure, and the person who was intitled to be guardian in soccage. When, therefore, land in military tenure descended from the father, and land in soccage from the mother, or *vice versa*, and they both centered in the same heir, the marriage of the heir was decided, says Bracton, by priority, in the manner before-mentioned*. But if lands in soccage and in military tenure descended from the same ancestor; then, notwithstanding the soccage might be of the prior feoffment, yet the privilege of military tenure prevailed, and the lord of those lands would exclude the next of kin, and have the ward and marriage*.

THUS was the person of the infant heir made a property of either by his guardian in chivalry or in soccage: the disposal of the heir in marriage might be sold to the best purchaser, like the fruits and profits of his lands. We shall soon see*, that the legislature made some provision against this oppression, in the case of guardians in soccage; but the others were rather secured in their rights by another

* Bract §9. b. * Ibid. §3. * Ibid. §3. b. * Ibid. §1. * Stat. Mar.

provision of this reign, which made void all conveyances of the inheritance to the heir in the life of the ancestor; a practice by which tenants in chivalry endeavoured to avoid the claim of ward and marriage^a.

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HAVING considered the terms and conditions on which landed property might be held, the next object which naturally presents itself, is, the manner of acquiring a title to property: and this was of three kinds; by *gift*, by *succession*, and by *will*. We shall consider these three in their order, beginning with the first^b. A gift of land might be considered in various ways; either as, what is called by Bracton, *libera et pura donatio*, or that which was *sub conditione*; and, in another respect, such as was *absoluta et larga*, or that which was *stricta et coarctata* to certain particular heirs, with an exclusion of others. These will be treated of more minutely hereafter; when we have first enquired what persons were capable of making gifts of land, and what not.

Of gifts of land:

THE person who was regularly and properly intitled to make a gift of his land, was he who was seised in fee; but yet some others who had an inferior interest, could, to a certain degree, make a gift; as any one who had a freehold, though only for life; and even such as had no freehold; as one who had a term for years, or the wardship of land: and indeed those who had no lawful title; as one who was in seisin by intrusion or by disseisin, might, says Bracton, convey a freehold, though it was not a complete and indefeasible one. A gift made by a minor, or a madman, would be good, if confirmed after the one was of age, and the other had become of sane memory^c. Those who could not make a gift, were such as had not a general and free disposal of their property: such was the condition of minors, who were *sub tutela vel cura*; yet these could accept a gift with consent of their tutor, as the

By whom:

^a Vid. post. Stat. Marib.

^b Bract. 10. b.

^c Ibid. 21. b.

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law allowed them to meliorate their condition, though not to lessen it by making a gift, even with consent of their tutor: the same of a person deaf and dumb; a person taken prisoner by an enemy, while in the enemy's custody; or a leper removed from the converse of mankind. Others were incapacitated *sub modo*. Thus archbishops, bishops, abbots and priors, could not make gifts without the assent of the chapter; nor the chapter without the assent of the king, or other patron, whoever he might be; the concurrence of all, whose interest was concerned, being absolutely requisite. Rectors of churches, as they possessed nothing but in the name of their churches, could make no alienation thereof but by consent of the bishop or patron^d; nor even make any change therein for the better^e. Bracton lays it down, that a bastard could not give his land unless he had heirs of his body, or he had made lawful assigns thereof, conformably with the terms of the donation. This restriction on the alienation of a bastard seems to have been imposed in favour of the lord; who, as the law now stood (though it was otherwise in Glanville's time), would, on failure of heirs, succeed by escheat. For a similar reason no one charged with felony could alien his land with effect, though the gift would hold *till* he was convicted, and if he was acquitted would be valid. All gifts between a husband and wife were void^f; nor could a husband give his land to another, to be conveyed by the donee to his wife in his life-time, or after his death, as that would be a fraud upon the letter of the law.

To whom.

Thus far of the persons who might make a gift of land; next of those *to whom* a gift may be made. A gift, as has been before said, might be made to a minor; and in such a case, a *tutor*, or *curator*, used to be appointed to accept and take care of such gift; but the law did not

^d So Bracton reads. *Quere*, if it should not be *void*?

^e Bract. 12.

^f Vid. ant. 91. 115.

allow the feoffor to appoint such tutor^f; for that, says Bracton, would seem like a continuance of the seisin, instead of making a feoffment of it. A gift might be made to a Jew, unless the original charter had a clause which forbid such an alienation; it being very common in those days to add to the clause of assignment *exceptis viris religiosis, et Judæis*: it seems, that Jews were not by law incapacitated from taking gifts of land, except in these particular cases^g. If a gift was made by a man to his wife and his children, or her children begotten of another husband, the gift, though void as to the wife, would hold as to the others.

It has before been said, that a person might give what he had in fee, for life, or for years; to which may be added, that he had this power, whether he was seised to himself solely, or in common with another. He might also give that which he had in expectancy after the death of his ancestor, who held it in fee. He might give what he had granted before to another for a term of years, with a saving to the farmer of his term; because these two possessions could very well consist with each other, so as one should have the freehold, and the other the term.

It has before been shewn, that these gifts might be of greater or less extent and duration; they might be in fee, for life, in fee farm, for term of life, or for term of years. Where a gift was for life, whatever the circumstances might be, the donee had immediately *liberum tenementum*, or, as it has since been called, a *freehold interest*, so as to have an assise, if he was ejected; and such a donee might, as has before been said, make an imperfect donation in fee, or for life; so great consideration did the law bestow on a freehold of any sort^h.

^f Bract. 1. 2. b. It is to be regretted that Bracton has not informed us by whom he was to be appointed.

^g These terms of *Tutor* and *Curator* are borrowed from the civil law, and the appointment of them to pro-

tect property given to an infant is adopted from the same source. Inst. lib. 1. tit. 13. et sequent.

^h Bract. 13.

ⁱ Ibid. 13. b.

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To ascertain that gifts were actually made by the parties whose names were to the deed of gift, and that they were in a capacity to manage their affairs, a writ was framed requiring the sheriff to make inquisition whether the donor was *compos sui*; which writ was either to be executed before the sheriff, and guardians of the pleas of the crown, or before the justices at Westminster¹. There was another writ, to enquire if it was the donor's seal, or was really affixed to the charter by him; and if, upon enquiry, any one was charged with a fraud respecting the gift, he was summoned to answer for it². All gifts should be free, and without compulsion; and therefore, should it be proved that any coercion was used with the donor, the gift was revoked; but if the donor dissimbled the force, and did not complain of it till some length of time, he would not be permitted afterwards to invalidate the gift by such a suggestion. If it was in time of war, he was to make a declaration thereof as soon as peace was restored; if in time of peace, then, says Bracton, as soon as he had escaped from the duress, he was to raise a hue and cry after the parties; and in either of these cases, he would be considered by the law as having done all in his power³.

Of simple gifts.

HAVING premised these observations concerning the capacity of persons to become donors and donees; the next subject is the donation itself. It has been said that donations were, some of them, simple and pure; that is, where no condition or modification was annexed. The following is a pure and simple gift of land, and, as it was the common form of gifts or feoffments at this time, is very well worthy of notice: *De tali tantam terram in villa tali, pro homagio et servitio suo, habendum et tenendam eidem tali et heredibus suis de me, et heredibus meis tantum, ad tales terminos, pro omni servitio, et consuetudine seculari, et demandâ; et ego et heredes mei warrantizabimus, acquietabimus, et de-*

¹ Bract. 14. b.² Ibid. 15.³ Ibid. 16. b.

fendemus

sendimus in perpetuum prædictum talem, et hæredes suos, versus omnes gentes per prædictum servitium, &c. A gift like this, *tali et hæredibus suis*, was to be understood in the large sense of the term *hæres*, and as comprehending all heirs, both near and remote^m. Another way of enlarging this clause was, *tali et hæredibus suis, vel cui terram illam dare vel assignare voluerit*, with a clause of warranty co-extensive with such a donation. In such case, if the donee assigned and died without heirs, the donor was bound to warrant the assignee; which could not be without such an express engagement in the deed of gift; so that the express mention of assignees seemed necessary to give a complete power of alienation.

As a gift might be made largely, so it might, as before stated, be *coarctata*, and confined to particular heirs; as, *tenendam sibi, et hæredibus suis QUOS DE CARNE SUA ET UXORE SIBI DESPONSATA PROCREATOS HABUERIT*; or, *tali et uxori suæ, or cum tali filiâ meâ, &c. tenendam sibi, et hæredibus suis de carne talis uxoris, or filiæ exeuntibus, &c.* In these cases the inheritance descended to the particular heirs there specified, to the exclusion of all others. If a person so infeoffed should infeoff any other, the heirs would be bound to warranty; for though some had endeavoured to maintain that they took together with their ancestor, yet Bracton denies it, and says, they only took by descent. And should the person so infeoffed have no such heirs, or they should fail, the land would revert to the donor by a tacit condition, without any mention thereof in the gift.

THE construction of law upon the estate and interest of such donees was, that, in the first of the above cases, should there be no heir, the land given would be a freehold in the donee, but not a fee; in the second, it would be a freehold, if heirs were born, and then it would become a fee; and when they failed, it would again become

^m Bract. 17.

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Of conditional
gifts.

only a freehold. Thus, we see, it was at the pleasure of the donor, at the creation of the gift, to modify it as he pleased, however contrary to the general disposition the law would make thereof; in which instances the maxim, that *conventio vincit legem*, was the principle which governed: and this was not only in prescribing what heirs should inherit, but also in the service to be performed; which, as has been seen before, was in the breast of the feoffor to order as he liked, so as he warranted his tenant against the chief lords^a.

We have hitherto spoken of the heirs that were pointed out by the will of the donor to succeed to the inheritance. We shall next take notice of the conditions and modifications under which the inheritance was to be enjoyed; and these imported sometimes a burthen, sometimes a benefit, to the donee, and were of different kinds. Thus a gift might be, *tenendum sibi et hæredibus suis, si hæredes hæuerit de corpore suo procreatos*: where, if the donee had heirs of his body, though they afterwards failed, yet he had satisfied the condition, and all his heirs, without distinction, became entitled to inherit: but if no such heir had been born, the land given would have been only a freehold, and would return to the donor, to the exclusion of the heirs general, because the condition had not been fulfilled. If a gift was *viro et uxori, et hæredibus uxoris*; or, *viro et uxori, et hæredibus viri*; or, *viro et uxori et hæredibus communibus, si tales extiterint, vel si non extiterint, tunc ejus hæredibus qui alium supervixerit*; these were all *sub modo*. Others were *sub modo*, and also *adjectâ conditione*; as, *Do tali tantam terram, ut det mihi tantum*; or, *ut mihi inveniatur necessaria*. These gifts, though not wholly gratuitous, yet, Bracton says, were *simplex et pura*; and if livery was given thereon, they could not be revoked, though the condition was not performed, unless there had

^a Bract. 17. b.

been an express covenant entitling the donor to enter for breach of the condition *.

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THE limitation of estates went much further than what has yet been stated. A person would make a gift to his eldest son *A. tenendum sibi et hæredibus suis de corpore suo præsentis*; and if he had no such heirs, or they should fail, then to his second son *B.* to whom he directed it to revert, to have and to hold to him in the same manner; and upon like failure to *C.* his third son, in the like way; and so on: and if the said *A. B.* and *C.* all died without such heirs, the land to revert to the donor and his heirs; which last was unnecessary, as the law would, of course, give the reverter to him. Other gifts were as large as the former was confined; as, *tenendum tibi et hæredibus tuis, vel cui dare, vel assignare in vitâ, vel in morte legare volueris*. A regard to the will of the donor induced them to support such gifts; for Bracton lays it down, that if the legatee got the seisin, and an assise was brought against him by the heir, he might plead the form of the gift, and it would be a bar †: so that the restraint upon gifts of land by will, which seemed one of the strictest points in the law of landed property, might be dispensed with by the special form of the original gift.

INNUMERABLE were the conditions upon which gifts might be made. Some of these were conditions precedent, and some subsequent, to the vesting of the estate given: some of them were supported by law, and some not; and various were the reasons given why they should not be supported. A few instances of this kind will serve; as, *Do tibi talem terram, si Titius voluerit*; *si navis venerit ex Asia*; *si Titius venerit ex Jerusalem*; *si mihi decem aureos dederis*; *si cælum digito tetigeris*; and the like ‡; some of which were accompanied with an express condition of reverter on failure in performing the terms on which the gift was made, and some not.

* Bract. 18. a. b.

† Ibid. 18. b.

‡ Ibid. 19.

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THE course of descent was entirely under the controul of the donor in making the gift. A gift was sometimes made to a person for a term of years, and after that term to revert to the donor; with an agreement that if the donor died within the term, the land should remain to the donee for life, or in fee, as it might happen. Thus a freehold and fee might be raised by a condition; and in the same manner might be changed into a term; for when a gift was made for life, it might be added as a condition, that, should the tenant die within a certain time¹, his heirs, tenants, assigns, or executors, should retain the land for a certain term after his death. When land was given to a creditor in *vadium*, it was sometimes agreed, that if the money was not paid at an appointed day, he should hold it to him and his heirs. Gifts were often made for a term of years, yet so as to be restored to the donor, if he ever returned into the kingdom; but if he died in his voyage, or did not return, to remain to the termor in fee; upon the performance of which condition the term ceased, and the fee commenced².

In all gifts in *maritagium*, or to a *bastard*, there was an express or tacit condition of reverter. If land was given to a bastard in marriage with a woman, it was always either to them *et hæredibus eorum communibus*, or, *hæredibus ipsius uxoris tantum*. In the former case, there was, by a tacit condition in the gift, a reverter to the donor, upon failure of common heirs: in the latter, if she had heirs by the bastard, the land went to them: if she had none, it descended to other heirs of the wife, whether born of another husband, or collateral. Suppose land was given to a bastard solely, without his wife, *ei et hæredibus suis*, or *ei et assignatis suis*; in the former case, upon failure of heirs, whether homage had been done or not, the land, contrary to the usage in Glanville's time³, escheated for want of

¹ Bract. 19. b.² Ibid. 20.³ Vid. ant. 119.

heirs; in the latter, if he had made an alienation, it was good, though there was a failure of heirs^u. If a bastard had a brother, that brother could not take from him by descent.

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LAND was sometimes given before the espousals by some relation of the wife to the husband with his wife, or to both of them; as, *tali viro et uxori sue, et eorum heredibus*, or *alicui mulieri ad se maritandum*, or simply, without any mention of marriage; but if there was mention of marriage, then the land so given was called *maritagium*. A *maritagium* used to be given either before, or at the time of, or after, the matrimonial contract. *Maritagium* was, as has been said before^z, of two kinds: it was *free*, or *not free*; the particulars of which distinction were now more minutely set forth, than in the time of Glanville. *Liberum maritagium* was, where the donor was willing that the land should be quit and free from all secular service^y belonging to the lord of the fee, so as to perform no service down to the third heir inclusive, and the fourth degree. The degrees were computed in this way: the donee made the first, his heir the second, his heir the third, and the heir of the second heir the fourth. The heirs were computed thus: the son or daughter of the donee was the first, the son or daughter of them the second, and their son or daughter the third; which third heir was to do homage and perform the service. As there was a reverter to the donor, on failure of heirs, there was to be no homage in these gifts; but should those in the right line fail, the land would go to the remoter heirs, if the form of the gift allowed it^z.

THESE gifts were made in different ways. If land was given *tali filie mee ad se maritandum*, without mention of heirs, this conveyed only a freehold, and not a fee; and therefore, after the death of the wife, it reverted to the do-

^u Bracl. 20. b. Vid. ant. 290. ^y Vid. ant. 121. ^z Bracl. 21. ^z Ibid. 21. b. nor;

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nor; nor had the husband any claim upon it *per legem Angliæ* ^a. If it was *ad se maritandam, et tenendam sibi et hæredibus suis*, generally; then, though she had no heirs of her body, the remoter would be called in, and the husband would possess it *per legem Angliæ*. If it was confined to particular heirs, it reverted on failure of such heirs. Thus, if it was to the common heirs of the husband and wife, and they had a daughter, and the husband died, and the widow married again and had a son, the daughter would be preferred to the son; though it would be otherwise, had the gift been to the wife only, and the heirs of her body ^b.

Estates by
courtesy.

THE right of a husband to retain the land of his deceased wife *per legem Angliæ*, is defined by Glanville and Bracton in the same manner, except that the former ^c states it as if confined to estates given with the woman in *maritagium*: if so, this claim had now extended itself; for Bracton says, the husband should have the land if he married a woman *habentem hæreditatem, vel maritagium, vel aliquam terram ex causâ donationis*, having any inheritance, whether a *maritagium* or other gift of land ^c. He agrees likewise with Glanville, that the second husband was equally intitled with the first. It seems, one *Stephanus de Segrave*, whose name we find among the justices itinerant in this reign, had written a treatise, in which he had combated this opinion, as founded on a misconception of the meaning and design of this sort of estate. He thought there was an injustice in giving an estate *per legem Angliæ* to the second husband, more especially when there were children alive of the first marriage.

THE crying of the child, which was a necessary circumstance towards establishing a title to this estate, was to be proved *per sectam sufficientem*, consisting of persons who heard, with their own ears, the cry; and not by those who

^a Bract. 22. b.^b Id. *ibid.*^c Vid. ant. 122.^c *Ibid.* 437. b.

had it by hearsay. The cry was only an evidence of the child being born alive; but this evidence was more regarded than any testimony of midwives or nurses, who might be induced, by various motives, to give false testimony; and no proof of the child being born alive, and christened as such, would be received in lieu thereof. So rigid were the lawyers of those days in exacting this only proof of life, that where the child was born deaf and dumb, they pronounced, *tamen clamorem emittere DEBET, sive masculus sive femina*; which expectation had been thrown by the lawyers of those days into a singular monkish verse*. If the child was a monster, and, instead of a *clamor*, uttered a *rugitus*, as Bracton expresses it, it would not satisfy the requisite of the law, much less would a birth that was supposititious^d.

THE tenant *per legem Angliæ* was to have all incidents that happened, whether in services, wards, reliefs, or the like, during his life; but if any land, or inheritance, fell in after the death of the wife, such accession went to the heir, if of age; if not, to the chief lord who had custody of him; as likewise did the wards and the like; it being a rule, that the husband should retain nothing that did not accrue in the life-time of the wife.

AMONG other impediments to the husband claiming this estate, Bracton reckons that of having *machinatus in mortem uxoris*; and this, he says, would be a good plea to bar him of his right. If no heir was born of the marriage, and the husband held possession by force, after the death of the wife, the next heir might have the following writ, which is recorded to have been framed for one *Ranulphus de Dadescomb* by *W. de Ralegh*, a name often found among the justices of this period. *Rex vicecomiti salutem. Ostendit nobis A. quod cum B. et C. uxor*

* The verse is as follows:

Nam dicunt e vel a quævis nascuntur ab Ev^l.

^d Bract. 438.

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ejus tenuissent tantam terram, &c. ut jus, et hæreditatem ipsius C. quæ nuper obiit sine hærede de corpore suo procreato (ut dicitur), unde terra illa descendere debuit ad prædictum A. sicut ad propinquiorem hæredem ipsius C. quia prædicta C. sine hærede de corpore suo procreato decessit; idem B. post mortem prædictæ C. uxoris suæ contra legem et consuetudinem regni nostri cum vi suâ se tenet in eadem, ita quod prædictus A. in prædictam terram, ut in jus et hæreditatem suam, ingressum habere non potest. Et ideo tibi præcipimus, quod si prædictus A. fecerit te, &c. tunc summonneas, &c. prædictum B. quod sit coram justitiariis, &c. ostensurus quare deforceat eidem A. prædictam terram, et habeas ibi, &c. which seems to be the most simple form of a writ of entry; a species of writs which had lately grown into vogue, and of which more will be said in the proper place.

Of reversions.

HAVING said thus much of estates which reverted to the donor upon a condition expressed or implied, it may be requisite to consider the effect and consequence of such a reverter or reversion. The reversioner, says Bracton, was considered neither *pro hærede* nor *loco hæredis*; nor was he bound to warrant any thing done by the donee, except the appointment of dower; and this only where the donation was pure, without any condition or modification whatever. Land reverted not only for a failure of heirs or assigns, but in case of felony committed by the tenant, which threw a perpetual impediment in the way of descent; in which instance, it might happen that the donor had made a reservation of the services to himself, which made him lord, and then he took it as an escheat. In such case, he was deemed *in loco hæredis*, and was accordingly bound to warrant whatever was completed by the donee before the felony; as any gift or demise for a term, provided the act was complete; for if it was not, as, from the nature of the thing, was the case in dower, it would not avail after a conviction for felony; nor was the donor, though he came *in loco hæredis*, bound to warrant it^f.

^a Bract. 438. b.^f Ibid. 13.

WE have hitherto been speaking of estates given to a man and his heirs; but land was sometimes given *ad terminum* or *ad tempus*, for a term; as for a $\frac{1}{2}$ term of life, or years; that is, the life of the grantor, or grantee: or for a time; as where a gift was "till provision was made for the donee." In gifts of this kind it was important whether there was only mention that the donor should make provision, without saying any thing of his heirs, or both the donor and his heirs were included; and whether it was to be for the donee only, or the donee and his heirs. If the donor's heirs were not included, and no provision was made in the life of the donor or donee, the land remained in fee to the donee; but if provision was made in their lives, the land reverted to the donor by the form of the gift. If the heirs of the donor only were included, and not those of the donee, and neither the donor nor his heirs provided for the donee in his life, the land remained to the donee and his heirs in fee, although the heir of the donor, or the donor himself was ready to provide for the heirs of the donee, after the donee's death. But if, on the other hand, the heirs of the donee and those of the donor were mentioned, and the donor provided for the donee, or his heirs, the land reverted to the donor; and should the donor have made no provision in his life-time, it was not sufficient that his heirs were ready to do it, because the form of the gift required it to be otherwise. If there was no mention of heirs at all, then should the donor make no provision for the donee during their joint lives, the law was, that the land should remain in fee to the donee. If land was given for the life of the donee, and not of the donor, nor in fee, then it was considered as a freehold in the donee: if the reverse, then the law considered it as the freehold of the donor, and not of the donee, because it might,

* This was called a holding *ad firmam*, and the persons so holding were called *firmarii*. *Firma*, in the Italian, signifies a bargain or contract.

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if the donor died first, be revoked in the life of the donee, and revert to the heirs of the donor. Again, if a gift was made for the life of the donor to the donee and his heirs, then, should the donee die first, his heirs would hold it for the life of the donor, and they could recover in an assise of mortdauncestor, stating that their ancestor died seised *as of fee*^b: and if the donor died first, then, for the reason above given, it became the freehold of the donor and not of the donee. If there was no mention of heirs of the donee, yet the land needed not immediately, in such case, revert of course to the donor; for the donee might, if he pleased, make a testament of it, as of any chattel; and such a will, according to Bracton, was good in law.

If a gift was made by a man for him and his heirs without naming the heirs of the donee, and without saying expressly it should be for life, yet the land became the *freehold* of the donee as long as he lived. But should a gift be made *ad terminum annorum*, for a term of years, however long, even though it exceeded the usual length of man's life, yet the donee did not by such a gift obtain a *freehold*; because a term of years was a certain and determinate period, and the term of life uncertain; the uncertainty of the determination of the estate being what Bracton seems to consider as absolutely necessary to constitute a freehold-interest. A term of years was treated as an interest that did not at all impede any further disposition of the land so held; for the person who let it, might within the term make a gift of the land to another, or to the same person in fee. If it was to the farmer, one sort of possession would thus be changed into another; if to another, the possession of the farmer would still remain unimpaired; for a term and a feoffment of the same land might consist very well together. In such case, there

^b Bract. 26. b.

would be different and distinct rights. To the feoffee would belong the property of the fee and the freehold; the farmer could claim nothing but the usufruct, that is, to enjoy the use and produce freely during his term, without any obstruction from the feoffee.

LAND, says Bracton, might be given *at the will* of the giver, and so on as long as he pleased, *de termino in terminum*, and *de anno in annum*; under which lease the person taking had no freehold; the owner of the *proprietas* could at any time reclaim it, as being nothing in law but a precarious possession ^l.

ANOTHER sort of gifts was to cathedral, conventual, and parochial churches, and religious men. These were said to be *in liberam eleemosynam*. They were sometimes *in liberam et perpetuam eleemosynam*; in which cases, the donee was not excused from the burthen of service: but if the gift was what they termed *in liberam, puram, et perpetuam eleemosynam*, then he was; and the donor and his heirs were bound to warrant the donee against all claims of the chief lord ^k.

THE next subject is the consideration the law had of the several before-mentioned gifts; all which were imperfect, till possession or seisin was given to the donee. The degrees of possession made a subject of very minute distinction and refinement at this time, and is discoursed on by Bracton ^l at length. It is sufficient to say, that the completest possession which could be had, was, when the *ius*, and *seisina*, the title to the land, and the seisin of it, went together; for the donee had then *juris et seisinæ conjunctio*; the highest of all titles ^m. But this could not be obtained without a formal *traditio*, or *livery*; for land was not transferred by homage, nor by executing charters or instruments, however publicly they might be transacted, but by the donor giving full and complete seisin thereof to

^l Bract. 27. b.^k Id. ibid.^l Id. 28. b.^m Id. 39. b.

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the donee, either in person or by attorney. This was by publicly reading the charter (and if livery was made by attorney, by reading the letters of attorney) in presence of the neighbours, who were called together for that particular purpose; upon which the donor retired from the possession, both *corpore et anima*, without any intention of returning to it as lord; and the donee was put into the vacant possession, *animo et corpore*, with a resolution of retaining possession; in short, one party ceased, and the other began to possess it: for the donor never ceased to possess till the donee was fully in seisin; it being a rule of law, that the seisin could not remain vacant for the minutest space of time. This is the account given of livery by Bracton, who adds this definition of it: *de re corporali de personâ in personam de manu propriâ vel aliênâ* (that is, of an attorney) *in alterius manum gratuita translatio*. And if livery was thus made by the true owner of the land, the donee had immediately the freehold by reason of the *juris et seisinæ conjunctio* *.

THERE were some cases where livery was not necessary, and any expression of the owner's will, that the property should be changed, had the same effect as livery: thus, where land was lett for a term of life, or years, and afterwards the donor sold or gave it wholly to the donee, it became the property of the donee immediately: the same where a person was in possession by disseisin or intrusion; the law allowing, in these cases, a fiction to supply the fact of the land having really passed out of one hand into the other.

WHEN a livery was made, it had the effect of conveying to the person to whom it was made, every thing the maker of it had: whether he had a mere right and property of the fee, a freehold, or usufruct, it all belonged to the donee. But for this purpose, it was not sufficient that the

* Bract. 39. b.

* Id. 40. b.

donee came into the occupation of part of the land; for if any person belonging to the donor remained on another part, he thereby retained the whole, notwithstanding the livery: and it was absolutely necessary towards completing the livery, that the donor and every one belonging to him should leave the land. If the person making livery had only the usufruct,* yet he thereby gave to his feoffee a freehold, as far as concerned himself, and all others who had no right, though *not* as against the true owner. If he had nothing, nothing he could give; yet if a person was only in possession, let that be as inferior as might be, it is clearly laid down by Bracton, that he could give a *precarious* fee and freehold by livery†. As livery might be made either by the donor in person or his attorney, so it might be accepted either by the donee or by his attorney‡.

LAND might be transferred not only by a legal title, and livery thereon, but without title or livery at all, namely, *per usucaptionem*; that is, by continual and peaceable possession for a length of time; yet what length of time was necessary to give such a right, was not defined by the law, but was left to the discretion of the justices*. Thus all intrudors, disseisors, farmers holding over their term, persons continuing in possession contrary to a covenant or the original form of the gift, if they were suffered to remain in that condition without any interruption for a length of time, gained a right and freehold. Though this was the law amongst subjects, in order to avoid dormant and litigious claims, yet in the case of the king it was otherwise; the maxim of *nullum tempus occurrit regi* having already obtained in his favour‡.

* It is worthy of remark, that this piece of old law was reconsidered, and after long discussion confirmed, 500 years after Bracton wrote, in a famous case in the King's Bench. Vid. Burr. Rep. 60.
 † Bract. 41. b.
 ‡ Ibid. 51. b.
 § Ibid. 52. and 103.

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Rights.

WE have hitherto been speaking of *corporeal things*. It follows, that something should be said of *incorporeal*, and the methods of transferring them. These were called *jura* and *servitudes*, or *rights*; and being things neither visible nor tangible, could not pass by livery: they therefore passed by agreement of the parties contracting¹, and by a view of the corporeal thing to which they belonged; thus, by a fiction of law, they became what was called *quasi*-possessed; and he who was so in possession by fiction of law, had a *quasi*-use till he lost the possession by violence or by non user: for as possession of a corporeal thing could be lost by non user, so could a *quasi*-possession of an incorporeal thing. But when there was an actual user of an incorporeal thing, the possession was retained by the user, and became real, instead of fictitious; and when a person had thus made use of his right, he might transfer the right and the use to another, which before user he^e could not. If a person, however, who had an incorporeal right to him and his heirs, died without any user thereof, the title would descend to his heirs.

THESE rights were generally considered as, and were called, *appurtenances* to some corporeal thing, as to a farm or tenement; and were commons, rights of advowson, and the like². An advowson and common were sometimes not appurtenant to any thing, but subsisted as independent rights³. Of a nature similar to these were other incorporeal things, which were given by the king only, as liberties and franchises; such as jurisdiction and judicature, treasure-trove, waifs, tolls, exemption from tolls, and numberless other royalties, which were granted by charter from the king to the subject⁴.

BESIDES the gifts above-mentioned, which, being transactions between man and man, were to take effect immediately, there was another sort, which was to take effect

¹ Bract 93. b.² Ibid. 54.³ Ibid. 54. b.⁴ Ibid. 55. b.

after the donor's death : such a gift was called *donatio mortis causa*. A gift of this kind was generally made by a person in sickness, or going upon a voyage, and had in it a tacit condition, that it should be revocable upon the recovery or return of the giver. Should a gift not be accompanied with this condition, it was a *donatio inter vivos*; and therefore, if made between husband and wife, was void. A *donatio mortis causa* was confirmed by the death of the giver.

THE principal gift of this kind was by testament; and this did not take place till after the death of the giver*. The whole law of testaments stated by Glanville, is delivered by Bracton as law, and sometimes in the very words of that author; it will therefore be unnecessary to do more than notice such parts as are more explicitly treated by Bracton, together with such additions as he has made, to Glanville's account*. He says, that, generally, a wife could not make a will without the consent of her husband; yet that it had been usual (as was intimated by Glanville^b) for the wife to make a will of the *rationabilis pars* which would come to her if she survived her husband, and particularly of such things as were given her for the dress and ornament of her person, as her clothes and jewels, all which might most properly be called her own.

GLANVILLE says, that the administration of intestates' effects belonged to the nearest of kin; but Bracton says, that in such case, *ad ecclesiam et ad amicos pertinebit executio bonorum*. The law upon the subject of testaments is thus laid down by our author. The expences of the funeral were to be allowed out of the effects, and the widow was entitled to receive all necessities thereout till her quarantine was expired, unless her dower was assigned before. If the deceased left no moveables, the heir was to be burthened with all the debts^c, as far as the inheri-

* Bract. 6e.

* Vid. ant. 2c.

* Vid. ant. 111.

* Bract. 6c. b.

jurisdictionem), to suppose that the ecclesiastical court might have gradually gained jurisdiction over all personal legacies, under colour of such as were given *in pios usus*^b. This might have been the first step towards it; but it is most probable, that there was a direct authority for this innovation derived from the canon law. For although the *Decretals*, where it is set forth as a general law, were not published by Gregory IX. till the 24th year of Henry III. the canon which warrants this point of judicature was much more ancient, and, without doubt, had travelled hither long before the collection of Gregory was made; and the authoritative promulgation by that pope, might give new sanction to an usage which had obtained some time before.

THE granting administration of intestates' effects by the ordinary, though established on a more solid foundation, the express law of this country, by the charter of king John, and confirmed by that of Henry III.¹ did not prevail universally. It seems that lords in some places, in maintenance of their former right, still exercised some jurisdiction in the disposition of intestates' goods, in opposition to the authority of the bishops. The power hereby intrusted to the bishops was abused in a very shameful manner; for instead of taking order for a due distribution of such goods, when they had once got possession of them, they committed the administration of them to their own use, or the use of their churches, and so defrauded those, to whom, by right of succession, they belonged; and this they did with the pretence of law and conscience on their side, affecting that this disposition of them *in pios usus* very fully satisfied the requisition of law. This practice grew to such a height, as to occasion a constitution in this king's reign, enjoining that they should not dispose of them otherwise than

^b 3 Seld. 1675.

¹ This clause, as before observed, was left out of the *Injunctum*, 25

Ed. I. and so is not in the common printed charters.

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according to the Great Charter, that is, to the next of kin; notwithstanding which, the practice still continued, and the right of succession was, by degrees, in a manner altered. It was even stated by the canons, as the law of the land^k, that a third part of intestates' effects should be distributed for the benefit of the church and the poor^l; which was in effect the whole that properly belonged to the intestate, after the *partes rationabiles* of the wife and children. These abuses of ecclesiastical judges gave occasion to two statutes, made in the reign of Edward I. and Edward III.

Of descent.

THE last mode of acquiring property was by *succession*. The law of descent in the time of Glanville continued, with some small variation. We have seen that in Glanville's time the eldest son was the sole heir, in knight's service, and in most instances in soccage^m; but it was now laid down by Bracton, generally, that, in both cases, *jus descendit ad primogenitum*ⁿ. It was also now held, that all descendants *in infinitum* from any person who would have been heir, if living, were to inherit *jure representationis*. Thus the eldest son dying in the life-time of his father, and leaving issue, *that* issue was to be preferred, in inheriting to the grandfather, before any younger brother of the father; which settled the doubt that had occasioned so much debate in the time of Henry II.^o

THE rule of descent was, that the nearest heir should succeed; *propinquior excludit propinquum, propinquus remotum, remotus remotiorem*. Sometimes the right of blood constituted a particular sort of propinquity, to the prejudice of the male heir, who, in other instances, is so much favoured in our law; as in the following case: A man had a son and daughter by one wife, and after her death married another, and had a son and daughter by her; the son

^k Decretal. lib. 5. t. 3. c. 42.

^l 2 Sold. 168 t.

^m Val. ant. 78.

ⁿ Bract. 64. h.

^o Val. ant. 79.

of the second marriage made a *purchase* of land, and died without children: in this case, says Bracton, the sister by the second wife would take, in exclusion of the other brother and sister. Some were of opinion, that this piece of law was entirely confined to cases of purchased lands, but that it was otherwise in cases of inheritance; for there respect was always to be had to the common ancestor from whom the inheritance descended; and the right should never come to a woman so long as there was a male, or one descended from a male, whether from the same father and mother, or not^{*}. Bracton, however, seems to think, that this rule of descent was to be observed in *inheritances*, as well as in purchased lands; because every one, as he came into seisin, made a *stripes* and a first degree[†]: and so it was settled in the next reign, when this opinion of Bracton was adopted in the maxim, *seisina facit stripitem*. The impediment thrown in the way of descent by the rule, *nemo potest esse hæres et dominus*, still continued, though it was avoided by many devices; the most common of which was that of in-
feoffing to hold of the chief lord, and not of the feoffor; for this avoided the necessity of doing homage to the elder brother[‡].

THE law had provided a preventive against imposing supposititious children, to exclude those who were next intitled to the inheritance. If a woman, either in the life of her husband, or after his death, had pretended to be pregnant when it was thought she was not, in order to disinherit the heir; the heir might have a writ commanding the sheriff to cause the woman to come before him, and before the guardians of the pleas of the crown, or before such person as the king should authorize to judge therein, and cause her to be inspected by lawful and discreet women, in order to inquire of the truth[§]; and she was put in a sort of free custody during her pregnancy, that the

De partu supposito.

* Bract. 65. † Ibid. 65. b. ‡ Ibid. 68. a. b. § Ibid. 69, 70. a. b.